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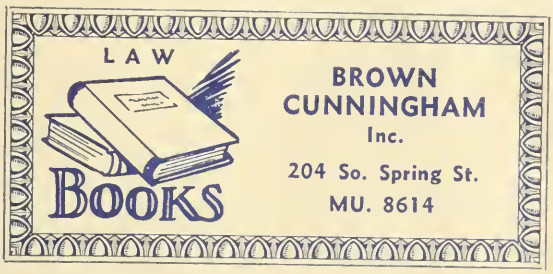
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CASES

ON THE

LAW OF REAL PROPERTY

SELECTED BY

PROF. JASPER C. GATES

Detroit College of Law, Detroit, Mich.

ST. PAUL, MINN.

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ILLUSTRATIVE CASES

ON THE

LAW OF REAL PROPERTY.

GOODARD v. WINCHELL.

(52 N. W. 1124, 86 Iowa, 71.)

Supreme Court of Iowa. Oct. 4, 1892.

Appeal from district court, Winnebago county; John C. Sherwin, Judge.

Action in replevin. The subject of the controversy is an aerolite. In the district court the cause was tried without the aid of a jury, and the court gave judgment for the plaintiff, from which the defendant appealed.

C. B. Elliot, C. H. Kelley, and W. S. Pattee, for appellant. Peters & Fisher and W. E. Bradford, for appellee.

GRANGER, J. The district court found the following facts, with some others, not important on this trial: "That the plaintiff, John Goodard, is, and has been since about 1857, the owner in fee simple of the north half of section No. three, in township No. ninety-eight, range No. twenty-five, in Winnebago county, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to. (2) That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. (3) That on the 2d day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about 66 pounds, fell onto plaintiff's land, described above, and buried itself in the ground to a depth of three feet, and became imbedded therein at a point about 20 rods from the section line on the north. (4) That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up. (5) That on May 5, 1890, Hoagland sold the aerolite in suit to the defendant, H. V. Winchell, for $105, and the same was at once taken possession of by said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. * * * (10) I find the value of said aerolite to be one hundred and one dollars ($101) as verbally stipulated in open court by the parties to this action; that the same weighs about 66 pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the 2d of May, 1890; that a member of Hoagland's family saw the aerolite fall, and directed him to it." As conclusions of law, the district court found that the aerolite became a part of the soil on which it fell; that the plaintiff was the owner thereof; and that the act of Hoagland in removing it was wrongful. It is insisted by appellant that the conclusions of law are erroneous; that the enlightened demands of the time in which we live call for, if not a modification, a liberal construction, of the ancient rule, "that whatever is affixed to the soil belongs to the soil," or, the more modern statement of the rule, that "a permanent annexation to the soil, of a thing in itself personal, makes it a part of the realty." In behalf of appellant is invoked a rule alike ancient and of undoubted merit, "that of title by occupancy;" and we are cited to the language of Blackstone, as follows: "Occupancy is the taking possession of those things which before belonged to nobody;" and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case, it will be well for us to keep in mind the controlling facts giving rise to the different rules, and note, if at all, wherein the facts of this case should distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title; that is, to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables "found upon the surface of the earth or in the sea." The term "movables" must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation of the earth and sea, it is not difficult to understand what is meant by "movables," within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite, of about 66 pounds' weight, that "fell from the heavens" on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing

in its material composition to make it foreign or unnatural to the soil. It was not a movable thing "on the earth." It was in the earth, and in a very significant sense immovable; that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as "unclaimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the rule invoked by appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "telltale messengers" from far-off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or, as appellant is pleased to denominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement, as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of $101, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said by appellant that this case is unique; that no exact precedent can be found; and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In the American and English Encyclopedia of Law (volume 15, p. 388) is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of Maas v. Amana Soc., 16 Alb. Law J. 76, and 13 Ir. Law T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. Law J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a

peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meager to indicate the trend of legal thought. Our conclusions are announced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

The judgment of the district court is affirmed.

KINGSLEY v. HOLBROOK.[1]

(45 N. H. 313.)

Supreme Court of New Hampshire. Cheshire. July, 1864.

Wheeler & Faulkner, for plaintiff. Mr. Lane, for defendant.

SARGENT, J. In Massachusetts and Maine and some other states, the courts have held, as stated in 1 Greenl. Ev. § 271, and note, that a sale of trees growing upon land is not a sale of real estate, unless it is contemplated that they shall remain so as to receive profit and growth from the growing surface of the land; unless the vendee was to have some beneficial use of the land in connection with the trees. Where such is the case, then a sale of standing trees is a sale of an interest in land, otherwise not. The authorities cited in the plaintiff's brief are in favor of the same view.

This doctrine had its origin, as it would seem, from 1 Ld. Raym. 182, where Treby, C. J., reported to the other judges that the question had arisen before him at nisi prius, whether a sale of timber, growing upon land, ought to be in writing by the statute of frauds, or might be by parol; and that he had ruled that it might be by parol, because it is but a bare chattel; and it is said that to this opinion Powell, J., agreed. Since then the decisions have been very conflicting both in England and in this country. Many decisions in regard to growing crops are quoted as bearing upon the question as to whether growing trees are to be considered personal property, or an interest in land. These decisions are no less conflicting, however, and aid us very little in establishing any general rule based upon principle.

But we find this distinction noted in Dunne v. Ferguson, cited in Stephens, N. P., 1971, from 1 Hayes, 542. The case was trover for turnips. In October, 1830, the defendant sold to the plaintiff a crop of turnips which he had then recently sown, for a sum less than ten pounds. During the winter following and while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them which he converted to his own use. No note in writing was made of the bargain. It was contended for the defendant, that trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing, pursuant to the statute of frauds.

In deciding the case Joy, Chief Baron (Barons Smith, Pennefeather, and Foster concurring), says: "The general question for our decision is, whether there has been a contract for an interest concerning lands within the second section of the statute of frauds; or whether it merely concerned goods and chattels; and that question resolves itself into another, whether or not a growing crop is goods and chattels. In one case it has been held that a contract for potatoes did not require a note in writing because the potatoes were ripe; and in another case the distinction turned upon the hand that was to dig them, so that if dug by A. B. they were potatoes, and if by C. D., they were an interest in lands. Such a course always involves the judge in perplexity and the case in obscurity. Another criterion must therefore be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law growing crops were uniformly held to be goods, and they were subject to all the leading consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them, and provides for land and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If before the statute a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. * * * And, as we think that growing crops have all the consequences of chattels, and are, like them, subject to be taken in execution, we must rule the points saved for the plaintiff."

Growing annual crops for many purposes are, and always have been, considered chattels. They go to the executor upon the death of the owner of the land, and not to the heir, and they may be levied on and sold upon execution like other personal chattels. And this being the case when the statute of frauds was enacted, they continued to be so treated and may properly be so now. But the word "land" is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on, and all pass under the general description of land in a deed. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support, and, upon the death of the ancestor, they pass to the heir, as a part of the inheritance, and not to the executor, as emblements, or as chattels. Neither can they be levied upon and sold on execution, as chattels, while standing. This being the case when the statute of frauds was passed, it has since then been properly held, we think, that a sale of growing trees, with a right at any future time, whether fixed or indefinite, to enter upon the land and remove them, does convey an interest in the land. It has been so held in this state (Putney v. Day, 6 N. H. 430; Olmstead v. Niles, 7 N. H. 522), and more recently in other states (Green v. Armstrong, 1 Denio, 550; Warren v. Leland, 2 Barb. 614; Pierpont v. Barnard, 5 Barb. 364; Dubois v. Kelley, 10 Barb. 496; Buck v. Pickwell, 27 Vt. 157; Yeakle v. Jacob, 33 Pa. St. 376); also in England (Scorell v. Boxall, 1 Younge & J. 396; Teal v. Auty, 2 Brod. & B. 99).

I think, therefore, that, upon the weight of authority and upon reason, the doctrine early

[1] Irrelevant parts omitted.

established in this state, that a sale of growing timber is ordinarily a sale of an interest in land, is sound and ought to be sustained. Our statute, providing for the sale of timber or wood growing or standing on any land, separate from the land, by an administrator under a license from the judge of probate, also declares that such timber or wood shall be deemed to be real estate. Rev. St. c. 164, § 6.

Let us examine the deed in this case and see if it is sufficient to convey an interest in land. Under the law of 1791, in relation to conveyances, it was held, that, although a sale of timber to be removed in a certain time conveyed an interest in land, so that the conveyance must be in writing, yet it need not be by deed. Putney v. Day, 6 N. H. 430; French v. French, 3 N. H. 234; Pritchard v. Brown, 4 N. H. 397; Olmstead v. Niles, 7 N. H. 522. In the last case cited, Parker, J., says: "Whether the statute of 1829, which repealed the act of 1791, has made any alteration in this respect, is a question which does not arise in this case."

But that question soon after arose, and it was held, that, by the law of 1829, no conveyance of any interest whatever in real estate could be made, except by deed duly signed, sealed, and witnessed by two witnesses; that, without all these requisites, the deed, or writing, conveyed absolutely nothing to any person; and that it conveyed nothing as against anybody but the grantor and his heirs, unless it were also acknowledged and recorded. Stone v. Ashley, 13 N. H. 38; Underwood v. Campbell, 14 N. H. 393. In the last case cited it is held, that, under the statute of 1791, a seal is essential in order that an instrument may operate as a conveyance under the statute of uses (27 Hen. VIII. c. 10), which has been adopted in this state; and that a seal is also necessary that the writing may operate as a conveyance by way of bargain and sale under the same statute of 1791.

The deed in this case is sufficient under the statute of frauds to convey an interest in land, for all that statute requires is that the conveyance be in writing. This deed is also sufficient under the statute of 1791, as interpreted in Underwood v. Campbell, supra, because it is sealed. But it would be void under the statute of 1829, according to the interpretation of Stone v. Ashley, supra, because not witnessed by two witnesses, for this deed is not witnessed at all.

Does the law of the Revised Statutes change the law of 1829 in this respect? The law of 1829 enacted that no deed of bargain and sale, &c., should be valid unless executed in manner aforesaid, which was by being signed, sealed, and witnessed by two witnesses. Laws N. H. 1830, p. 533. The Revised Statutes (chapter 130, § 3) provide that every deed or other conveyance of real estate shall be signed and sealed by the party granting the same, attested by two or more witnesses, acknowledged, &c., and recorded, &c., and section 4 provides that no deed of bargain and sale, mortgage or other conveyance of any real estate, or any lease, &c., shall be valid to hold the same against any person but the grantor and his heirs, unless such deed or lease be attested, acknowledged and recorded as aforesaid. It will be seen that the only change contemplated in the Revised Statutes was, that a deed not attested by two witnesses might be good as against the grantor and his heirs, whereas by the statute of 1829, it was expressly provided that it must be thus attested in order to be good against anybody. As the law now is, the conveyance will not be good, unless signed and sealed, to convey anything to anybody, but it may be good as against the grantor and his heirs without being witnessed, acknowledged, or recorded. Hastings v. Cutler, 24 N. H. 481. This deed from the Holbrooks to Conant was therefore sufficient, under the Revised Statutes, being signed and sealed, as against the grantor and his heirs, so that the standing timber which constituted an interest in land passed by this deed to Conant.

The next question is, was the written agreement or defeasance which was made at the same time with the deed properly admitted? Our statute (Rev. St. c. 131, § 2) provides that "no conveyance in writing of any lands shall be defeated, nor any estate encumbered by any agreement, unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured, or other thing to be performed." The question might perhaps arise, whether this does not refer to mortgages only. But we think it is not thus limited. In the original law as passed in 1829 (Laws N. H. 1830, p. 488), it was provided that no title, or estate, &c., in any lands, &c., should be "defeated or encumbered by any agreement whatever, unless such agreement, or writing of defeasance, shall be inserted in the condition of said conveyance, and become part thereof, stating the sum, &c., to be secured, or the other thing or things to be performed." There was evidently no intention to change this statute in the revision, and its terms are clearly broad enough in the original act, and must have been intended to cover a case like this.

The written agreement, or defeasance, should not have been admitted, and, of course, the other evidence in regard to the extension of the time of getting off the timber was immaterial. The result is that the deed conveyed the timber absolutely, and this accompanying paper was a contract upon which Conant might have been liable to the Holbrooks, if he did not perform its conditions, and that agreement might be modified by parol. If there had been no modification of that contract, then Conant was to forfeit all the timber he did not get off in three years, and if he did not abide by that contract he would be liable in damages for a breach of it. But if it was modified and the time extended, then he might not be liable. But the deed conveyed the timber to Conant absolutely.

If the parties here intended to make a conditional deed, the condition should have appeared in the deed, and then the title or interest would have been held subject to that condition, as in any other case of a conditional deed.

This writing was also improperly admitted upon another ground. Since we hold that the property conveyed was an interest in land, which can only be conveyed by an instrument under seal, this writing, in order to have operated as a defeasance, must have been also under seal, which is not the fact; so that, independent of our statutes, the writing was not admissible in evidence. Lund v. Lund, 1 N. H. 41; French v. Sturdivant, 8 Greenl. 246; Bickford v. Daniels, 2 N. H. 71; Runlet v. Otis, Id. 167; Wendell v. Bank, 9 N. H. 404, 419.

* * * * * *

Judgment on the verdict.

CARNEY v.. MOSHER et al.

(56 N. W. 935, 97 Mich. 554.)

Supreme Court of Michigan. Nov. 24, 1893.

Error to circuit court, Hillsdale county; Victor H. Lane, Judge.

Action of trover by Darwin H. Carney against Orrin B. Mosher, Thomas J. Lowry, Lucien Walworth, and Henry S. Walworth, for the conversion of certain wheat. There was a judgment entered on the verdict of a jury directed by the court in favor of defendants, and plaintiff brings error. Affirmed.

Geo. A. Knickerbocker and Wm. C. Chadwick, for appellant. C. A. Shepard and St. John & Lyon, for appellees.

MONTGOMERY, J. The plaintiff brought trover for wheat grown upon land owned by defendant Orrin B. Mosher. The wheat was sown by Alvin L. Mosher while occupying the land as the tenant of Orrin B. The wheat was harvested by defendant Mosher, and sold to defendant Henry S. Walworth, who, it is claimed, had notice of plaintiff's rights. Prior to the spring of 1890, Alvin L. Mosher had occupied the land under a written lease, and in the spring of that year renewed his lease for one year by oral agreement. There had been a previous lease, and, as the testimony of plaintiff shows, on the occasion of the present letting, Alvin refused to pay the rent previously reserved, unless he should have the privilege of putting the land all into wheat, and it was agreed that he might do so. He proceeded to sow the land to wheat, and in January, 1891, sold the growing crop to plaintiff. In the spring, Alvin surrendered possession to Orrin B., who proceeded to reap the crop, after notice of plaintiff's purchase. The circuit judge directed a verdict for defendants on the ground that the lease was oral, and that the implied provision that the lessee should have the right to reap the crop of wheat was void, under the statute of frauds. The defendants contend that this holding should be sustained; and, further, as it appears that the rent was not paid during the year, nor since, that the lessee had no right to the crop, and that a purchaser would have no greater right than he; and, further, that if it be conceded that the purchaser of the crop of a tenant would not, in general, be affected by a subsequent default of the tenant, the present case is an exception to the rule, for the reason, as it is contended, that the transfer from Alvin Mosher to plaintiff was for the purpose of defrauding the defendant Orrin B. out of the rent. It is, however, a sufficient answer to this last contention that the fraud is not admitted, nor to be deduced as a legal consequence from conceded facts. It would therefore be a question for the jury, by the express terms of the statute. Section 6206, How. St.

If it be assumed that the tenant was in possession by right, and under a lease which gave him the right to reap the crop, as well as to sow, it follows that inasmuch as he sold the crop before any default on his part, so far as appears, and certainly before forfeiture, the purchaser from him obtained a title which could not be defeated by the lessee's subsequent default. This is the rule established in this state by Nye v. Patterson, 35 Mich. 413, and Miller v. Havens, 51 Mich. 482, 16 N. W. Rep. 865. See, also, Dayton v. Vandoozer, 39 Mich. 749. The question for our determination, therefore, is the one upon which the case was decided below, namely, did the parol lease for one year, with the agreement that the tenant might sow the land to wheat, give him a right to enter after the expiration of his lease, and reap the crop? On the part of the defendants, it is contended that the right claimed is in the nature of an interest in land, and that to sustain the right to reap the crop would be, in effect, extending the lease into the second year, and that said contract is therefore void, under the statute of frauds. On the other hand, it is contended that the lease terminated, according to its terms, at the end of one year, and that the right to enter in and reap the crop is one growing out of the nature of the previous lease, which has expired. It is very evident that, whatever the right to enter and reap the crop be called, it was a right which could not be exercised within one year. We think it is equally evident that it was an interest in land. The exclusive use of the land was required during three months after the end of a year from the letting, before the crop would ripen. That this was a burden upon the estate in the land is too plain for argument. It was held to be an interest in the land in Reeder v. Sayre, 70 N. Y. 183. In the present case, the lessee was in possession at the time of entering into the contract, and continued in possession under the void lease. This constituted him a tenant at will, under our holdings. See Huyser v. Chase, 13 Mich. 98. The tenancy could be terminated by either party on three months' notice to quit. The tenant did not wait for this, but left the premises in January or February, 1891. He paid no rent. The owner thereupon took possession, as he had a right to do, and as he could, but for the lessee's peaceable surrender, have done by a notice to quit. If it be suggested that treating the lease as void, under the statute of frauds, the tenant should, because of his previous relations, be treated as a tenant from year to year, he stands in no better situation, for the year would be terminated, under such holding, March 31, 1891, giving the owner the right to possession thereafter, and the right to reap the crop. The judgment will be affirmed, with costs. The other justices concurred.

TRUSTEES OF SCHOOLS et al. v. SCHROLL et al.

(12 N. E. 243, 120 Ill. 509.)

Supreme Court of Illinois. May 12, 1887.

Appeal from circuit court, Morgan county.

Ejectment by trustees of schools of township 16, range 13, to recover that part of section 16, township 16, range 13 W., of third principal meridian, in Morgan county, Illinois, lying east of lots 1, 2, and 3, and west of lots 4 to 13, in said section. The lands in controversy are, in fact, part of the bed of a sheet of water known as "Meridosia Lake." Judgment for defendants. Plaintiffs appeal.

Gallon & Thompson, for appellants, trustees of schools. Morrison & Whitlock, for appellees.

SHOPE, J. Fractional section 16 was, by the United States, "granted to the state, for the use of the inhabitants of such township, for the use of schools." Enabling Act of Congress, April 18, 1818 (3 Stat. 428); Organic Laws Ill. (1 Gross' St. 19). And this enabling act was formally accepted by an ordinance of the constitutional convention of August 26, 1818. Laws Ill. 1819, Append. 21; Organic Laws Ill. (1 Gross' St. 20). The enabling act and ordinance constituted, as this court held in Bradley v. Case, 3 Scam. 585, a solemn compact between the United States and this state, whereby the state of Illinois became the purchaser of the school section for a valuable consideration, with full power to sell or lease the same for the use of schools, as the state might provide, and think most beneficial to the inhabitants of the respective townships.

Sections 16, in the several townships in the state, having been granted and accepted as above stated, were not public lands within the act of congress of March 30, 1822 (3 Stat. 659), authorizing the state "to survey and mark, through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan," (Trustees v. Haven, 5 Gilm. 548); and for the like reason we must hold that they were not "swamp and overflowed lands, made unfit thereby for cultivation," remaining "unsold at the passage of" the act of congress of September 28, 1850 (9 Stat. 519); being an act "to enable the state of Arkansas and other states to reclaim the swamp lands within their limits." After the grant in 1818, they ceased to be public lands of the United States, nor could they after that time be regarded as unsold lands, and so they were unaffected by the swamp-land act.

When, therefore, the defendants in this case offered in evidence the deed of the county clerk of Morgan county, purporting to have been made by order of the county board of that county, on the authority of the laws of this state relating to swamp and overflowed lands, and to convey parts of this school section, the offer should have been denied, and it was error in the circuit court not to have sustained the plaintiff's objection. And this is so, independent of all questions as to whether the uncertain and defective description of the premises said to be part of this particular section rendered the deed inoperative to that extent, or whether the premises attempted to be conveyed formed any part of the lands sued for or bounded thereon. When, therefore, the official character of appellants was admitted, and the enabling act and ordinance of acceptance had been offered in evidence, appellants' right of recovery was complete, unless it could be shown that the state had parted with the title to the lands described in the declaration, or that the township authorities had parted with or lost their right of possession in the same.

It is contended by appellees that Meridosia Lake is a stream of water some five miles in length, and emptying into the Illinois river; and that appellants, by the proper officers, having platted and sold the land to the margin of and bordering on the stream, the grantees took to the middle of the stream; that the title of such grantees is an outstanding title; and appellees, being shown to be in possession under such grantees, rightfully prevailed in the circuit court, and ought to prevail here. The books and authorities are all agreed that streams and bodies of water within the ebb and flow of the tide are, at common law, navigable; and the riparian proprietor's title does not, speaking generally, extend beyond the shore. And it is equally well settled that grants of land, bounded on streams or rivers above tide-water, carry the exclusive right and title of the grantee to the center of the stream, usque ad filum aquæ, subject to the easement of navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. 3 Kent, Comm. 427; 2 Hil. Real Prop. 92; Ang. Water Courses, § 5; Jones v. Soulard, 24 How. 41; Indiana v. Milk, 11 Fed. 389; Canal Appraisers v. People, 17 Wend. 596; Child v. Starr, 4 Hill, 369; Seaman v. Smith, 24 Ill. 521; Rockwell v. Baldwin, 53 Ill. 19; Braxon v. Bressler, 64 Ill. 488; Ice Co. v. Shortall, 101 Ill. 46.

But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge. Ang. Water Courses, §§ 41, 42; 3 Kent, Comm. 429, note a; citing Bradley v. Rice, 13 Me. 201, and Waterman v. Johnson, 13 Pick. 261. See Warren v. Chambers, 25 Ark. 120; Indiana v. Milk, (Cir. Ct. U. S. D. Ind., Gresham, J.,) 11 Fed. 389; citing Wheeler v. Spinola, 54 N. Y. 377; Mansur v. Blake, 62 Me. 38; State v. Gilmanton, 9 N. H. 461; Paine v. Woods, 108 Mass. 160; Fletcher v. Phelps, 28 Vt. 257; Austin v. Railroad Co., 45 Vt. 215; Boorman v. Sunnuchs, 42 Wis. 233; Delaplaine v. Railway Co., Id. 214; Seaman v. Smith, 24 Ill. 521. See, also, Nelson v. Butterfield, 21 Me. 229; West Roxbury v. Stoddard, 7 Al-

len, 158; Canal Com'rs v. People, 5 Wend. 423, 446; Jakeway v. Barrett, 38 Vt. 316; Primm v. Walker, 38 Mo. 99; Wood v. Kelley, 30 Me. 47.

The line of defense adopted by appellees, as before stated, presupposes the existence of certain facts, viz.: (1) That appellants, being owners of section 16, granted the lands abutting upon the water spoken of as Meridosia Lake, within such section, bounding such grants along or upon the margin of such water; (2) that Meridosia Lake is not, at the common law, navigable; (3) that Meridosia Lake, and within the bounds of section 16, is a stream or river, as contradistinguished from a lake; and (4) that the terms of the grant do not clearly denote an intention to stop at the edge or margin of the stream.

If the record in this case shows the existence and concurrence of all these facts, this judgment, upon the authority of the cases cited, may be affirmed; but, if it shall appear that the case made by the record does not show the existence of the supposed facts, reversal must follow. It is not pretended that Meridosia Lake is a stream or body of water navigable at common law,—that is to say, it is not within the ebb and flow of the tide; and hence the rules of law applicable in such case cannot be invoked. The contention is that Meridosia Lake is a stream of water about five miles long, emptying into the Illinois river, with its southern extremity and outlet within the bounds of section 16. A careful examination of the records shows that this lake is a natural body of water, five or six miles long, and in some places a mile in width; that it is fed by springs; that its southern extremity extends into section 16; that it has no connection with any stream of water, except by a slough at the south end, and near the south line of section 16; that the body of the lake, in its natural state, is without current; but that during a portion of the year a current of water passes from the lake, through the slough referred to, into the Illinois river, which flow, however, is stopped in the summer. The record does not show the average width of the lake, the average depth of the water in the lake in its natural state, nor whether or not it is in fact navigable; nor are we able to learn therefrom the length and width of the slough, nor the depth of the water flowing through the same, or the rapidity of the flow from the lake into the river at the natural stage of water in the lake. All we can know of this outlet we must gather from the plat made by the township trustees in 1846, taken in connection with the fact testified to by witnesses, that, for a portion of the year, some water from a land-locked natural body of currentless water, five or six miles long, and in places a mile in width, flows therethrough; and from this alone we are asked to find and hold that such a body of water, so situated, is a stream, and not a lake. This, as we understand the law, we cannot do.

The word "stream" has a well-defined meaning, wholly inconsistent with a body of water at rest. It implies motion; as, to issue in a stream; to flow in a current. Webst. Dict. Indeed, the controlling distinction between a stream and a pond or lake is that in the one case the water has a natural motion,—a current,—while in the other the water is, in its natural state, substantially at rest. And this is so, independent of the size of the one or the other. The flowing rivulet of but a few inches in width is a stream as certainly as the Mississippi. And when lands are granted by the proprietor of both land and stream, bounding such grant upon the stream, the grantee acquires right and title to the thread or middle of the stream. This right is grounded upon the presumption that the grantor, by making the stream the boundary, intended his grantee to take to the middle of the stream; and this presumption will prevail until a contrary intent is made to appear. Rockwell v. Baldwin, 53 Ill. 19. The right spoken of does not rest upon the principle that, when a grant is bounded on a stream, the bed of the stream to the thread or middle passes as incident or appurtenant to the bordering land; for the bed of the stream is land, though covered with water, and land cannot pass as appurtenant to land.

As is said in Child v. Starr, 4 Hill, 369: "A conveyance of one acre of land can never be made, by any legal construction, to carry another acre by way of incident or appurtenance to the first." The riparian proprietor, claiming to the thread or middle of the stream, must show the bordering water to be a stream, and that his grant, in terms or legal effect, is bounded upon or along such stream; that the stream is made the boundary; and, while it is obvious that a currentless body of water cannot be a stream, the fact of some current in a body of water is not of itself, in every instance, sufficient to determine its character as a stream, as distinguished from a pond or lake. The presence of some current is not enough alone to work an essential change in so essentially different things as a stream and a lake; for a current from a higher to a lower level does not necessarily make that a stream or river which would otherwise be a lake, and the swelling out of a stream into broad water-sheets does not necessarily make that a lake which would otherwise be a river. Ang. Water Courses, § 4. We are therefore constrained to hold that the position, size, and character of this body of water, as shown by this record, fixes its character as a lake, and not a stream, notwithstanding some part of its water during a portion of the year may flow through the slough into the Illinois river.

Another fact, the existence of which is presupposed, is that the proper officers, acting under the laws of the state, granted the land bordering on so much of the stream called "Meridosia Lake" as was within section 16, bounding such grants on the stream. The only grants shown in this record to have been made, and upon which this contention could be based, are the patents issued to Edward Watson and Edward Lusk. Watson took un-

der his patent that part of section 16 designated on the plat of the section made by the trustees as lots 12 and 13, containing 22 4-100 acres by survey, and Lusk took under his patent lots 3 to 11, inclusive, by the same plat, containing by the plat 88¾ acres. By reference, the plat of the section made by the trustees in 1846 became a part of the conveyance, as much so as if it had been copied into the patent deed. Piper v. Connelly, 108 Ill. 646; Railroad Co. v. Koelle, 104 Ill. 455. And the rule of law is that, when lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat. McCormick v. Huse, 78 Ill. 363; citing McClintock v. Rogers, 11 Ill. 279. The patent deeds contain no intimation that the lots conveyed border on a lake or stream; and when we look at the plat, as we must, all we can determine is the shape and area of the several lots. No data is given from which we can determine the width or depth of any lot, nor can we know from the plat that either the east line of lot 3, or the west line of lots 4 to 13, inclusive, as shown on the plat, are in fact the western and eastern boundary of Meridosia Lake. It may be so in fact, but this record fails to show it to be so; while, as to lots 1 and 2, the record does not show that they were at any time sold or conveyed, or the title vested in the state in any way divested. We therefore hold that it does not appear from the record that the state, for the inhabitants of the township, granted all the lands bordering on Meridosia Lake, and within this fractional section 16, nor that the grants, to the extent they were made, were bounded on the lake. It is thus seen that the essential facts, the existence of which is presupposed as a basis for the defense interposed, are not shown to exist; and hence the defense based on the right, as riparian owners on streams, to take ad filum aquæ, cannot be invoked, and has no application to this case. For the reasons stated, all the evidence offered by the appellees on the trial, relating to the title, ownership, and possession of the lots shown by the trustees' plat, should have been refused as immaterial, and its reception, over the objection of appellants, was error.

One other question remains to be considered, viz., appellees' claim that they are in possession "of a portion of water known as 'Meridosia Lake,' claiming title to it by possession for more than 20 years, as fishermen." Appellants sue for a body of land. Some part of the premises described in the declaration must form the bed of that part of Meridosia Lake within section 16, but what part is lake bed and what shore we cannot determine from this record. Appellees' claim of title by possession is not of land, but of water. But if this should be thought hypercritical, and it be assumed that appellees' claim is of 20 years' adverse possession of the bed of the lake within the section, still it must be observed that such possession of land as here claimed is a conclusion of law arising from existing facts. The evidence preserved in the record goes no further than the declaration of witnesses that appellees, and those under whom they claim, had, and had had, exclusive possession for that length of time. But how, and to what extent, —whether the lake, or any part of it, was inclosed by fences, dams, walls, or weirs,— and how this adverse dominion was manifested, there is not one word to show. The claim, under this proof, is without force or merit.

The judgment of the circuit court is reversed, and the cause remanded.

ILLINOIS CENT. R. CO. v. STATE OF ILLINOIS et al. CITY OF CHICAGO v. ILLINOIS CENT. R. CO. et al. STATE OF ILLINOIS v. ILLINOIS CENT. R. CO. et al.

(13 Sup. Ct. 110, 146 U. S. 387.)

Supreme Court of the United States. Dec. 5, 1892.

Appeals from the circuit court of the United States for the northern district of Illinois. Modified and affirmed.

B. F. Ayers and John N. Jewett, for Illinois Cent. R. Co. John S. Miller and S. S. Gregory, for the City of Chicago. George Hunt, for the State of Illinois.

Mr. Justice FIELD delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a circuit court of Illinois, by an information or bill in equity filed by the attorney general of the state, in the name of its people, against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago. The United States were also named as a party defendant, but they never appeared in the suit, and it was impossible to bring them in as a party without their consent. The alleged grievances arose solely from the acts and claims of the railroad company, but the city of Chicago was made a defendant because of its interest in the subject of the litigation. The railroad company filed its answer in the state court at the first term after the commencement of the suit, and upon its petition the case was removed to the circuit court of the United States for the northern district of Illinois. In May following the city appeared to the suit and filed its answer, admitting all the allegations of fact in the bill. A subsequent motion by the complainant to remand the case to the state court was denied. 16 Fed. Rep. 881. The pleadings were afterwards altered in various particulars. An amended information or bill was filed by the attorney general, and the city filed a cross bill for affirmative relief against the state and the company. The latter appeared to the cross bill, and answered it, as did the attorney general for the state. Each party has prosecuted a separate appeal.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago river and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers, and other structures used by the railroad company in its business, and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago river, extended eastwardly, and a line extended in the same direction from the south line of lot 21 near the company's roundhouse and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers, and docks in the harbor.

We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company; and the court, in its elaborate opinion, (33 Fed. Rep. 730,) for that purpose referred to the legislation of the United States and of the state, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed, and are satisfied with its entire accuracy. It would therefore serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the state, and of the city, remaining after the legislation and proceedin s taken, we shall assume the correctness of that history.

The state of Illinois was admitted into the Union in 1818 on an equal footing with the original states, in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio river, out of which the state was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the state were prescribed by congress and accepted by the state in its original constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the mainland of the state and the middle of the lake, south of latitude 42 degrees and 30 minutes.

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. Pollard's Lessee v. Hagan, 3 How. 212; Weber v. Commissioners, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh

water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as said in the case of The Genesee Chief, 12 How. 443, 455, "'tide water,' and 'navigable water' are synonymous terms, and 'tide water,' with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;" and writers on the subject of admiralty jurisdiction "took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters."

But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide,—indeed, for hundreds of miles,—by the largest vessels used in commerce. As said in the case cited: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public, navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same, and, if a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it."

The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable; "tide waters" and "navigable waters," as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment,—a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty, and proprietary right have been encroached upon by the railroad company, and how far that company had at the time the assent of the state to such encroachment, and also the validity of the claim which the company asserts, of a right to make further encroachments thereon by virtue of a grant from the state in April, 1869.

The city of Chicago is situated upon the southwestern shore of Lake Michigan, and includes, with other territory, fractional sections 10 and 15, in township 39 N., range 14 E. of the third P. M., bordering on the lake, which forms their eastern boundary. For a long time after the organization of the city, its harbor was the Chicago river, a small, narrow stream opening into the lake near the center of the east and west line of section 10; and in it the shipping arriving from other ports of the lake and navigable waters was moored or anchored, and along it were docks and wharves. The growth of the city in subsequent years, in population, business, and commerce, required a larger and more convenient harbor, and the United States, in view of such expansion and growth, commenced the construction of a system of breakwaters and other harbor protections in the waters of the lake in front of the fractional sections mentioned. In the prosecution of this work there was constructed a line of breakwaters or cribs of wood and stone covering the front of the city between the Chicago river and Twelfth street, with openings in the piers or lines of cribs for the entrance and departure of vessels; thus inclosing a large part of the lake for the uses of shipping and commerce, and creating an outer harbor for Chicago. It comprises a space about one mile and one half in length from north to south, and is of a width from

east to west varying from 1,000 to 4,000 feet. As commerce and shipping expand, the harbor will be further extended towards the south; and, as alleged by the amended bill, it is expected that the necessities of commerce will soon require its enlargement so as to include a great part of the entire lake front of the city. It is stated, and not denied, that the authorities of the United States have in a general way indicated a plan for the improvement and use of the harbor which had been inclosed as mentioned, by which a portion is devoted as a harbor of refuge, where ships may ride at anchor with security and within protecting walls, and another portion of such inclosure, nearer the shore of the lake, may be devoted to wharves and piers, alongside of which ships may load and unload, and upon which warehouses may be constructed and other structures erected for the convenience of lake commerce.

The case proceeds upon the theory and allegation that the defendant the Illinois Central Railroad Company has, without lawful authority, encroached, and continues to encroach, upon the domain of the state, and its original ownership and control of the waters of the harbor and of the lands thereunder, upon a claim of rights acquired under a grant from the state and ordinance of the city to enter the city and appropriate land and water 200 feet wide, in order to construct a track for a railway and to erect thereon warehouses, piers, and other structures in front of the city, and upon a claim of riparian rights acquired by virtue of ownership of lands originally bordering on the lake in front of the city. It also proceeds against the claim asserted by the railroad company, of a grant by the state in 1869 of its right and title to the submerged lands constituting the bed of Lake Michigan, lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended in the same direction from the south line of lot 21 south of and near the machine shops and roundhouse of the company, and of a right thereby to construct at its pleasure, in the harbor, wharves, piers, and other works for its use.

The state prays a decree establishing and confirming its title to the bed of Lake Michigan, and exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, piers, and other improvements, against the claim of the railroad company that it has an absolute title to such submerged lands by the act of 1869, and the right, subject only to the paramount authority of the United States in the regulation of commerce, to fill all the bed of the lake within the limits above stated, for the purpose of its business, and the right, by the construction and maintenance of wharves, docks, and piers, to improve the shore of the lake for the promotion generally of commerce and navigation. And the state, insisting that the company has, without right, erected, and proposes to continue to erect, wharves and piers upon its domain, asks that such alleged unlawful structures may be ordered to be removed, and the company be enjoined from erecting further structures of any kind.

And first as to lands in the harbor of Chicago possessed and used by the railroad company under the act of congress of September 20, 1850, (9 St. p. 466, c. 61,) and the ordinance of the city of June 14, 1852. By that act congress granted to the state of Illinois a right of way, not exceeding 100 feet in width, on each side of its length, through the public lands, for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch to Chicago, and another, via the town of Galena, to a point opposite Dubuque, in the state of Iowa, with the right to take the necessary materials for its construction; and to aid in the construction of the railroad and branches, by the same act it granted to the state six alternate sections of land, designated by even numbers, on each side of the road and branches, with the usual reservation of any portion found to be sold by the United States, or to which the right of pre-emption had attached at the time the route of the road and branches was definitely fixed, in which case provision was made for the selection of equivalent lands in contiguous sections.

The lands granted were made subject to the disposition of the legislature of the state; and it was declared that the railroad and its branches should be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of their property or troops.

The act was formally accepted by the legislature of the state, February 17, 1851, (Laws 1851, pp. 192, 193.) A few days before, and on the 10th of that month, the Illinois Central Railroad Company was incorporated. It was invested generally with the powers, privileges, immunities, and franchises of corporations, and specifically with the power of acquiring by purchase or otherwise, and of holding and conveying, real and personal estate which might be needful to carry into effect, fully, the purposes of the act.

It was also authorized to survey, locate, construct, and operate a railroad, with one or more tracks or lines of rails, between the points designated and the branches mentioned; and it was declared that the company should have a right of way upon, and might appropriate to its sole use and control, for the purposes contemplated, land not exceeding 200 feet in width throughout its entire length, and might enter upon and take possession of and use any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, engine houses, shops, and other buildings

necessary for completing, maintaining, and operating the road. All such lands, waters, materials, and privileges belonging to the state were granted to the corporation for that purpose; and it was provided that when owned by or belonging to any person, company, or corporation, and they could not be obtained by voluntary grant or release, the same might be taken and paid for by proceedings for condemnation, as prescribed by law.

It was also enacted that nothing in the act should authorize the corporation to make a location of its road within any city without the consent of its common council. This consent was given by an ordinance of the common council of Chicago, adopted June 14, 1852. By its first section it granted permission to the company to lay down, construct, and maintain within the limits of the city, and along the margin of the lake within and adjacent to the same, a railroad, with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations, with reference to speed of trains, the receipt, safe-keeping, and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as the company might from time to time establish, and to have the right of way and all powers incident to and necessary therefor, in the manner and upon the following terms and conditions, namely: That the road should enter the city at or near the intersection of its then southern boundary with Lake Michigan, and follow the shore on or near the margin of the lake northerly to the southern bounds of the open space known as "Lake Park," in front of canal section 15, and continue northerly across the open space in front of that section to such grounds as the company might acquire between the north line of Randolph street and the Chicago river, in the Ft. Dearborn addition, upon which grounds should be located the depot of the railroad company within the city, and such other buildings, slips, or apparatus as might be necessary and convenient for its business. But it was understood that the city did not undertake to obtain for the company any right of way, or other right, privilege, or easement, not then in its power to grant, or to assume any liability or responsibility for the acts of the company. It also declared that the company might enter upon and use in perpetuity for its line of road, and other works necessary to protect the same from the lake, a width of 300 feet from the southern boundary of the public ground near Twelfth street, to the northern line of Randolph street; the inner or west line of the ground to be not less than 400 feet east from the west line of Michigan avenue, and parallel thereto; and it was authorized to extend its works and fill out into the lake to a point in the southern pier not less than 400 feet west from the then east end of the same, thence parallel with Michigan avenue to the north side of Randolph street extended; but it was stated that the common council did not grant any right or privilege beyond the limits above specified, nor beyond the line that might be actually occupied by the works of the company.

By the ordinance the company was required to erect and maintain on the western or inner line of the ground pointed out for its main tracks on the lake shore such suitable walls, fences, or other sufficient works as would prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger, and to construct such suitable gates at proper places at the ends of the streets, which were then or might thereafter be laid out, as required by the common council, to afford safe access to the lake; and provided that, in the case of the construction of an outside harbor, streets might be laid out to approach the same in the manner provided by law. The company was also required to erect and complete within three years after it should have accepted the ordinance, and forever thereafter maintain, a continuous wall or structure of stone masonry, pier work, or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake Park, at a distance of not more than 300 feet east from and parallel with the western or inner line of the company, and continue the works to the southern boundary of the city, at such distance outside of the track of the road as might be expedient, which structure and works should be of sufficient strength and magnitude to protect the entire front of the city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan; and that that part of the structure south of Lake Park should be commenced and prosecuted with reasonable dispatch after acceptance of the ordinance. It was also enacted that the company should "not in any manner, nor for any purpose whatever, occupy, use, or intrude upon the open ground known as 'Lake Park,' belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground;" and it was declared that the company should "erect no buildings between the north line of Randolph street and the south side of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars, or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks, and protection of the same."

The company was allowed 90 days to accept this ordinance, and it was provided that upon such acceptance a contract embodying its provisions should be executed and delivered between the city and the company, and that the rights and privileges conferred upon the company should depend upon the performance on its part of the requirements made. The ordinance was accepted and the required agreement drawn and executed on the 28th of March, 1853.

Under the authority of this ordinance the railroad company located its tracks within the corporate limits of the city. Those running northward from Twelfth street were laid upon piling in the waters of the lake. The shore line of the lake was at that time at Park Row, about 400 feet from the west line of Michigan avenue, and at Randolph street, about 112½ feet. Since then the space between the shore line and the tracks of the railroad company has been filled with earth under the direction of the city, and is now solid ground.

After the tracks were constructed the company erected a breakwater east of its roadway upon a line parallel with the west line of Michigan avenue, and afterwards filled up the space between the breakwater and its tracks with earth and stone.

We do not deem it material, for the determination of any questions presented in this case, to describe in detail the extensive works of the railroad company under the permission given to locate its road within the city by the ordinance. It is sufficient to say that, when this suit was commenced, it had reclaimed from the waters of the lake a tract 200 feet in width, for the whole distance allowed for its entry within the city, and constructed thereon the tracks needed for its railway, with all the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on the west. Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce,—foreign, interstate, or domestic. They were constructed under the authority of the law by the requirement of the city, as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the state as to require the interposition of the court for their removal or for any restraint in their use.

The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated,—the construction and operation of a railroad thereon, with one or more tracks and works in connection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials, and privileges belonging to the state were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed. While the grant to it included waters of streams in the line of the right of way belonging to the state, it was accompanied with a declaration that it should not be so construed as to authorize the corporation to interrupt the navigation of the streams. If the waters of the lake may be deemed to be included in the designation of streams, then their use would be held equally restricted. The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry, so far at least as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety. Nor did the railroad company acquire, by the mere construction of its road and other works, any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks, and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordinance, which was simply for the construction of a railroad on a track not to exceed a specified width, and of works connected therewith.

We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, but at present we are speaking only of what rights it acquired from the reclamation of the tract upon which the railroad and the works in connection with it are built. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership, and pass with the transfer of the land; and the land must not only be contiguous to the water, but in contact with it. Proximity, without contact, is insufficient. The riparian right attaches to land on the border of navigable water, without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. See Gould, Waters, § 148, and authorities there cited.

The riparian proprietor is entitled, among other rights, as held in Yates v. Milwaukee, 10 Wall. 497, 504, to access to the navigable

part of the water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. In the case cited the court held that this riparian right was property, and valuable, and, though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired. It had been held in the previous case of Dutton v. Strong, 1 Black, 23, 33, that, whenever the water of the shore was too shoal to be navigable, there was the same necessity for wharves, piers, and landing places as in the bays and arms of the sea; that, where that necessity existed, it was difficult to see any reason for denying to the adjacent owner the right to supply it; but that the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceased.

In this case it appears that fractional section 10, which was included within the city limits bordering on the lake front, was, many years before this suit was brought, divided, under the authority of the United States, into blocks and lots, and the lots sold. The proceedings taken and the laws passed on the subject for the sale of the lots are stated with great particularity in the opinion of the court below, but for our purpose it is sufficient to mention that the lots laid out in fractional section 10 belonging to the United States were sold, and, either directly or from purchasers, the title to some of them fronting on the lake north of Randolph street became vested in the railroad company, and the company, finding the lake in front of those lots shallow, filled it in, and upon the reclaimed land constructed slips, wharves, and piers, the last three piers in 1872-73, 1880, and 1881, which it claims to own and to have the right to use in its business.

According to the law of riparian ownership which we have stated, this claim is well founded, so far as the piers do not extend beyond the point of navigability in the waters of the lake. We are not fully satisfied that such is the case, from the evidence which the company has produced, and the fact is not conceded. Nor does the court below find that such navigable point had been established by any public authority or judicial decision, or that it had any foundation, other than the judgment of the railroad company.

The same position may be taken as to the claim of the company to the pier and docks erected in front of Michigan avenue between the lines of Twelfth and Sixteenth streets extended. The company had previously acquired the title to certain lots fronting on the lake at that point, and, upon its claim of riparian rights from that ownership, had erected the structures in question. Its ownership of them likewise depends upon the question whether they are extended beyond or are limited to the navigable point of the waters of the lake, of which no satisfactory evidence was offered.

Upon the land reclaimed by the railroad company as riparian proprietor in front of lots into which section 10 was divided, which it had purchased, its passenger depot was erected north of Randolph street; and to facilitate its approach the common council, by ordinance adopted September 10, 1855, authorized it to curve its tracks westwardly of the line fixed by the ordinance of 1852, so as to cross that line at a point not more than 200 feet south of Randolph street, in accordance with a specified plan. This permission was given upon the condition that the company should lay out upon its own land, west of and alongside its passenger house, a street 50 feet wide, extending from Water street to Randolph street, and fill the same up its entire length, within two years from the passage of the ordinance. The company's tracks were curved as permitted, the street referred to was opened, the required filling was done, and the street has ever since been used by the public. It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago river, the city, by another ordinance, adopted September 15, 1856, granted it permission to enter and use, in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its then breakwater and a line drawn from a point thereon 700 feet south of the north line of Randolph street extended, and running thence on a straight line to the southeast corner of its present breakwater, thence to the river, and the space thus indicated the railroad company occupied and continued to hold pursuant to this ordinance; and we do not perceive any valid objection to its continued holding of the same for the purposes declared,—that is, as additional means of approaching and using its station grounds.

We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks, and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the state passed on the 16th of April, 1869, the material part of which is as follows:

"Sec. 3. The right of the Illinois Central Railroad Company under the grant from the state in its charter, which said grant constitutes a part of the consideration for which the said company pays to the state at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident to such grant, appropriation, occupancy, use, and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections ten and fifteen,

township and range as aforesaid, is hereby confirmed; and all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for a distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell, or convey the fee to the same, and that all gross receipts from use, profits, leases, or otherwise, of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts, and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the state treasury, semiannually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided, also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor."

The act of which this section is a part was accepted by a resolution of the board of directors of the company at its office in the city of New York, July 6, 1870, but the acceptance was not communicated to the state until the 18th of November, 1870. A copy of the resolution was on that day forwarded to the secretary of state, and filed and recorded by him in the records of his office. On the 15th of April, 1873, the legislature of Illinois repealed the act. The questions presented relate to the validity of the section cited, of the act, and the effect of the repeal upon its operation.

The section in question has two objects in view: One was to confirm certain alleged rights of the railroad company under the grant from the state in its charter and under and "by virtue of its appropriation, occupancy, use, and control, and the riparian ownership incident" thereto, in and to the lands submerged or otherwise lying east of a line parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15. The other object was to grant to the railroad company submerged lands in the harbor.

The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed from its ownership of lands in sections 10 and 15 on the shore of the lake. Whether the piers or docks constructed by it after the passage of the act of 1869 extend beyond the point of navigability in the waters of the lake must be the subject of judicial inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found, on such inquiry, to extend beyond the point of such navigability, then the state will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the state and the facts established, may be authorized by law.

As to the grant of the submerged lands, the act declares that all the right and title of the state in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot 21, south of and near to the roundhouse and machine shops of the company, "are granted in fee to the railroad company, its successors and assigns." The grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell, or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor, or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor, or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations, the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as

many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period, and renew it at its pleasure; and the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is by the act converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

The circumstances attending the passage of the act through the legislature were on the hearing the subject of much criticism. As originally introduced, the purpose of the act was to enable the city of Chicago to enlarge its harbor, and to grant to it the title and interest of the state to certain lands adjacent to the shore of Lake Michigan, on the eastern front of the city, and place the harbor under its control; giving it all the necessary powers for its wise management. But during the passage of the act its purport was changed. Instead of providing for the cession of the submerged lands to the city, it provided for a cession of them to the railroad company. It was urged that the title of the act was not changed to correspond with its changed purpose, and an objection was taken to its validity on that account. But the majority of the court were of opinion that the evidence was insufficient to show that the requirement of the constitution of the state, in its passage, was not complied with.

The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.

That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of

the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.

The harbor of Chicago is of immense value to the people of the state of Illinois, in the facilities it affords to its vast and constantly increasing commerce: and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose,—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces something more than 1,000 acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor, but embracing adjoining submerged lands, which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly, if not quite, equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are equal to those of New York and Boston combined. Chicago has nearly 25 per cent. of the lake carrying trade, as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to 22,096, with a tonnage of over 7,000,000; and in 1890 the tonnage of the vessels reached nearly 9,000,000. As stated by counsel, since the passage of the lake front act, in 1869, the population of the city has increased nearly 1,000,000 souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant, which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining,

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney in Martin v. Waddell, 16 Pet. 367, 410: "When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." In Arnold v. Mundy, 6 N. J. Law, 1, which is cited by this court in Martin v. Waddell, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the supreme court of New Jersey comments upon the rights of the state in the bed of naviga-

ble waters, and, after observing that the power exercised by the state over the lands and waters is nothing more than what is called the "jus regium," the right of regulating, improving, and securing them for the benefit of every individual citizen, adds: "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a state over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

In the case of Stockton v. Railroad Co., 32 Fed. Rep. 9, which involved a consideration by Mr. Justice Bradley, late of this court, of the nature of the ownership by the state of lands under the navigable waters of the United States, he said:

"It is insisted that the property of the state in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the state house at Trenton, and the surrounding grounds belonging to the state, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the state holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that prior to the Revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder."

Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for public uses for which they are adapted. Martin v. Waddell, 16 Pet. 367, 410; Pollard's Lessee v. Hagan, 3 How. 212, 220; McCready v. Virginia, 94 U. S. 391, 394.

In People v. Ferry Co., 68 N. Y. 71, 76, the court of appeals of New York said:

"The title to lands under tide waters, within the realm of England, were by the common law deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise De Jure Maris (page 22) Lord Hale says: 'The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use.' And Mr. Justice Best, in Blundell v. Catterall, 5 Barn. & Ald. 268, in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' * * *

"The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right."

While the opinion of the New York court contains some expressions which may require explanation when detached from the particular facts of that case, the general observations we cite are just and pertinent.

The soil under navigable waters being held

by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state.

In Newton v. Commissioners, 100 U. S. 548, it appeared that by an act passed by the legislature of Ohio in 1846 it was provided that upon the fulfillment of certain conditions by the proprietors or citizens of the town of Canfield the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the court refused the injunction, holding that there could be no contract and no irrepealable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment,—neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

As counsel observe, if this is true doctrine as to the location of a county seat, it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right, as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

The legislation of the state in the lake front act, purporting to grant the fee of the submerged lands mentioned to the railroad company, was considered by the court below, in view of the preceding measures taken for the improvement of the harbor, and because further improvement in the same direction was contemplated, as a mere license to the company to prosecute such further improvement as an agency of the state, and that to this end the state has placed certain of its resources at the command of the company, with such an enlargement of its powers and privileges as enabled it to accomplish the objects in view; and the court below, after observing that the act might be assumed as investing the railroad company with the power, not given in its original charter, of erecting and maintaining wharves docks, and piers in the interest of commerce, and beyond the necessities or legitimate purposes of its own business as a railroad corporation, added that it was unable to perceive why it was not competent for the state, by subsequent legislation, to repeal the act and withdraw the additional powers of the company, thereby restricting it to the business for which it was incorporated, and to resume control of the resources and property which it had placed at the command of the company for the improvement of the harbor. The court, treating the act as a license to the company, also observed that it was deemed best, when that act was passed, for the public interest, that the improvement of the harbor should be effected by the instrumentality of a railroad corporation interested to some extent in the accomplishment of that result, and said:

"But if the state subsequently determined, upon consideration of public policy, that this great work should not be intrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or state constitution forbade the general assembly of Illinois from giving effect by legislation to this change of policy. It cannot be claimed that the repeal of the act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges, for which the railroad company paid nothing, although, in consideration of the grant of such additional powers and privileges, it agreed to pay a certain per centum of the gross proceeds, receipts, and incomes which it might derive either from the lands granted by the act, or from any improvements erected thereon. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purposes contemplated by the legislature,—certainly not

within any given time,—and could not have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to, because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the effect of the act of 1873 was only to remit the railroad company to the exercise of the powers, privileges, and franchises granted in its original charter, and withdraw from it the additional powers given by the act of 1869 for the accomplishment of certain public objects." If the act in question be treated as a mere license to the company to make the improvement in the harbor contemplated as an agency of the state, then we think the right to cancel the agency and revoke its power is unquestionable.

It remains to consider the claim of the city of Chicago to portions of the east water front, and how such claim, and the rights attached to it, are interfered with by the railroad company.

The claim of the city is to the ownership in fee of the streets, alleys, ways, commons, and other public grounds on the east front of the city bordering on the lake, as exhibited on the maps showing the subdivision of fractional sections 10 and 15, prepared under the supervision and direction of United States officers in the one case, and by the canal commissioners in the other, and duly recorded, and the riparian rights attached to such ownership. By a statute of Illinois the making, acknowledging, and recording of the plats operated to vest the title to the streets, alleys, ways, and commons, and other public grounds designated on such plats, in the city, in trust for the public uses to which they were applicable. Trustees v. Havens, 11 Ill. 556; Chicago v. Rumsey, 87 Ill. 354.

Such property, besides other parcels, included the whole of that portion of fractional section 15 which constitutes Michigan avenue, and that part of the fractional section lying east of the west line of Michigan avenue, and that portion of fractional section 10 designated on one of the plats as "Public Ground," which was always to remain open and free from any buildings.

The estate, real and personal, held by the trustees of the town of Chicago, was vested in the city of Chicago by the act of March 4, 1837. It followed that when the lake front act of 1869 was passed the fee was in the city, subject to the public uses designated, of all the portions of sections 10 and 15 particularly described in the decree below. And we agree with the court below that the fee of the made or reclaimed ground between Randolph street and Park row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, was in the city. The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the breakwater on the shore west of it did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracts on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did.

We also agree with the court below that the city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block 23, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks, and levees, subject, however, in the execution of that power, to the authority of the state to prescribe the lines beyond which piers, docks, wharves, and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.

It follows from the views expressed, and it is so declared and adjudged, that the state of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same, is valid and effective for the purpose of restoring to the state the same control, dominion, and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

But the decree below, as it respects the pier commenced in 1872, and the piers completed in 1880 and 1881, marked 1, 2, and 3, near Chicago river, and the pier and docks between and in front of Twelfth and Sixteenth streets, is modified so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of lots formerly constituting part of section 10, extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake, and if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad com-

pany to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the state as may be authorized by law, and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the state as may be authorized by law. Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company, and it is so ordered.

HOWE v. ANDREWS.

(26 Atl. 394, 62 Conn. 398.)

Supreme Court of Errors of Connecticut. Dec. 6, 1892.

Appeal from superior court, Tolland county; Fenn, Judge.

Action by Emily M. Howe against William R. Andrews to recover damages for taking ice from plaintiff's millpond. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Sumner and H. Clark, for appellant. G. A. Conant and J. T. Lynch, for appellee.

THAYER, J. The plaintiff owns a gristmill and sawmill situated upon her own land, and to supply water for operating the mills maintains a dam upon lands owned by the defendant and others, and thereby sets back the water of a small stream, creating a shallow pond, which covers about 3½ acres of their land. The defendant took and carried away for mercantile purposes ice formed upon the pond, and to facilitate such taking and removal drove teams over the earthwork of the dam, and set wooden posts therein. Upon the trial to the jury the defendant's title to any of the land flowed was disputed by the plaintiff, and the plaintiff's right to use the ponded water for the purposes of the sawmill was denied by the defendant; but for the purposes of the present consideration it may be assumed that the plaintiff had the right to maintain her dam and use the water of the pond for both of her mills, and that the defendant had the title to the land flowed. Each party upon the trial claimed the absolute ownership of the ice formed upon the pond; the plaintiff as incident to her right of pondage, the defendant as incident to his right to the soil. The chief questions raised by the appeal relate to the correctness of the judge's charge as given, and of his refusal to charge as requested, touching the defendant's right to the ice. Every owner of land through which a stream of water runs has ordinarily a right to the use of the water of the stream as it is wont to run. This right may, however, be parted with. A lower proprietor may by purchase, adverse user, or by proceedings under the flowage act, acquire the right to dam the stream, and set back the water upon the land of the proprietor above, and to use the water thus ponded in various ways and for various purposes. Unless the upper proprietor has parted with or lost his right to so use the water of the stream, he may doubtless use it for domestic purposes, and for watering his stock and irrigating his land, although it has been thus ponded. He may make any use of it not inconsistent with the original or acquired rights of the owner below,—any use which works no actual and perceptible injury to his rights. When one has acquired the right to flow the lands of another for mill purposes only, the latter has not the right, as matter of law, to take and use for mercantile purposes the ice formed upon the pond over his land. This was expressly decided in Manufacturing Co. v. Smith, 34 Conn. 462. When such removal will cause a material injury to the pond owner in his use of the water for his mill, it may not be removed. Whether it will so injure him depends upon the facts and circumstances of each particular case, and the question must be determined by the trior.

The defendant in his first and third requests asked the court in effect to charge without qualification that the ice upon the pond belonged to the defendant as owner of the soil, and in the fifth request to charge that, as owner of the soil, the defendant had the absolute right to remove the ice from the pond. The court correctly refused to charge as thus requested. The court instructed the jury that the plaintiff, as owner of the pondage right, was not the absolute owner of the ice formed upon the pond, but that she had the right to have the ice remain upon the pond so long as and whenever such continuance would be useful to her in the legitimate exercise of her right to use the water as motive power for her mills; and that, subject to this right, and only subject to it, the defendant, as owner of the soil, might make such use of the ice as did not interfere with or injure the plaintiff in her rights. This was a correct statement of the law, and a compliance with the defendant's second, fourth, sixth, and ninth requests to charge, so far as they were applicable to the case. The judge, however, at the close of his charge, read the defendant's requests, the ninth and fourth, with comments as follows: " 'Every proprietor of land through which a natural water course runs has an equal right to the use of it for every useful purpose to which it can be applied, as it is wont to run, without diminution or alteration; and a diminution of the water by a riparian proprietor is not a violation of an adjoining or down-stream proprietor's rights, unless such diminution is an actual injury to such adjoining or down-stream proprietor.' Now, gentlemen, this request, while generally speaking, correct, should, as applied to this case, be taken with certain limitations, which I have already explained to you. Subject to those limitations which I have already given to you, I charge the same to be the law of the case; and also, subject to a like limitation, I charge you, as further requested by the defendant, 'that the defendant has a right to use the water of the pond for watering his cattle, irrigating his lands, for domestic purposes, and for any reasonable profit or advantage, which does not, in a perceptible or substantial degree, impair the operation of the plaintiff's mill.' " The defendant insists that by attaching the limitation referred to the court in fact refused to charge as requested,—"that the defendant, as owner of the soil, might use the ice upon the pond

for any reasonable profit or advantage which did not in a perceptible and substantial degree impair the operation of the plaintiff's mill." While, generally speaking, the ninth request is a correct statement of the law, if given without limitation it would leave the jury to understand that in the present case the taking of the ice was not a violation of the plaintiff's rights if she still had the use of the stream as it was wont to flow. The court had already instructed the jury that, if the plaintiff had the right to pond the water for mill purposes, she had the right to have the ice remain upon the pond so long as and whenever its continuance would be useful to her in the operation of her mills, and that the defendant, in his use of the water, was subject to this right of the plaintiff. The court was correct in keeping this limitation of the defendant's right in view, and in applying the law of the request to the facts of the case in hand. And the same may be said regarding the like limitation of the fourth request.

Several reasons of appeal are based upon that portion of the charge wherein the jury were told that the defendant might become liable for implied damages "by the doing under a claim of right, and without the license and consent of the plaintiff of acts done persistently in defiance and disregard of her rights, regardless of whether they in fact injured her or not, and calculated to cause such injury, and calculated also, if continued, to ripen into rights by adverse user," and the reading in connection therewith of a portion of the opinion in Parker v. Griswold, 17 Conn. 301. The jury were told that the damages in such a case would be merely nominal or trivial. A verdict was returned for substantial damages, and it thus appears that the jury must have found an actual specific injury to the plaintiff, and the defendant has not been injured by this portion of the charge. It is therefore unnecessary to consider the questions raised by these reasons of appeal.

The language complained of in the second reason of appeal must be taken in connection with the words which immediately follow it. When so taken, it is a correct statement of facts, and was unexceptionable. The court was also correct in construing the deeds which were in evidence, and leaving it to the jury to determine whether the deeds referred to the land in question.

Several other errors are alleged to have occurred in the charge, but as they were not much insisted on in the argument, and manifestly worked no injury to the defendant, it is unnecessary to consider the questions. There is no error in the judgment appealed from.

ANDREWS, C. J., and CARPENTER and TORRANCE, JJ., concurred. SEYMOUR, J., concurred in the result, but died before the opinion was written.

MASTENBROOK v. ALGER.

(68 N. W. 213.)

Supreme Court of Michigan. July 28, 1896.

Appeal from circuit court, Kent county, in chancery; Allen C. Adsit, Judge.

Bill by Jacob Mastenbrook against Frank C. Alger to enjoin a diversion of water from a stream for the purposes of irrigation. From a decree as prayed by plaintiff, defendant appeals. Modified.

Charles L. Wilson and Myron H. Walker, for appellant. John M. Mathewson, for appellee.

MOORE, J. Complainant filed a bill, as the lower proprietor of land, alleging that the defendant, who was an upper proprietor, had constructed a dam across a water way which runs through complainant's land, the effect of which was to divert the water from its natural channel onto defendant's land, where it is wholly absorbed, and that none of the water is allowed to come to the land of the complainant. The bill contained no allegation of damages, but it did aver that complainant has no other running water on his farm for his stock; that the stream of water runs near his house and barns, and is of great benefit to him for his natural purposes; that he has the equitable right to have the water flow across and upon his land; that he has suffered damages, and has been deprived of the equitable right to the use of the water by defendant; and that he is remediless at law. The defendant admits that he constructed a dam on his land, but denies that the dam prevents the flow of any water to the lower proprietor, but claims that one-half of it was allowed to flow to the lower proprietor. He claims that his dam was in substantially the same place as was a dam erected in 1852 or 1853, and which had been maintained long enough to give him a prescriptive right to maintain it; that one-half of the stream was diverted by the erection of the dam in 1852 or 1853; and that he now has the right to divert one-half of the waters of said stream, and use them for irrigation or any other purpose. There was a large amount of testimony taken in the case, and Judge Adsit made a decree in which he found that the complainant was entitled to have the stream of water flow across his land for domestic purposes and stock, except as said stream may be lessened by the use by defendant of water for domestic purposes and stock. He further found that the volume of water furnished by said stream is barely sufficient to sustain the stock of complainant, defendant, and other riparian proprietors along the stream, with water for their natural wants, and for domestic use, and that there is not a sufficient volume of water, so that the defendant can use any part thereof in the irrigation of his land. He found that the defendant had obstructed the flow of water in said stream, and used it for the purpose of irrigation, and that the appropriation of water by the defendant was contrary to the rights of complainant. He made a decree perpetually enjoining the defendant from appropriating any of the water to the purposes of irrigation, and from using the water for any other than ordinary purposes, in supplying the natural wants of the defendant, including the use of the water for domestic purposes in connection with his home, and the use of his farm. He also made in the decree a direction that the defendant forthwith remove any and all dams and obstructions made or maintained by him upon his land, or from interfering with, obstructing, or perverting the flow of said stream upon said lands of complainant, except as above stated. From that decree the defendant appeals.

It is claimed by defendant that, inasmuch as there is no allegation in complainant's bill that he is damaged to the amount of $100, the bill did not confer jurisdiction on the court, and should have been dismissed. We do not think this contention can be sustained. Rowland v. Doty, Har. (Mich.) 3; White v. Forbes, Walk. (Mich.) 112.

Something more than 500 pages of testimony was taken in the case. It would not be profitable to make an analysis of it here. A careful examination of the testimony shows that the decree of the learned judge was warranted by the facts shown, except in one particular. The record discloses that in 1852 or 1853 a dam was put across this stream, on the premises of defendant, for the purpose of diverting a portion of the stream to the house and barns occupied by the then proprietor, for the purpose of supplying the natural wants of the proprietor, including the use of the water for domestic purposes and for stock, in connection with his home and farm. This dam was maintained, either at that place or at another, sufficiently long, so that a prescriptive right is acquired to maintain it for the purpose of furnishing a supply of water for domestic purposes. The use of the water by defendant for purposes of irrigation is entirely unwarranted. It is not until very recently that an attempt has been made to use the water for that purpose. In view of the fact that this dam was maintained so long for the purposes of conveying water to the house and barns of defendant, which is a great convenience to him, and the effect of removing the dam would do away with that valuable right, and compel the defendant to carry water a long distance, we think the decree ought to be modified in that particular. The defendant should be allowed to have the use of so much of the water in said stream as shall be necessary for ordinary purposes in supplying his natural wants, including the use of the water for

domestic purposes and for stock, in connection with his home and farm, and for no other purpose; and he ought to be allowed to maintain such a dam or obstruction in said stream as would enable him to convey the water to his house and barns in sufficient quantities for said purposes, and for no other purpose. The decree is modified to this extent, and affirmed in all other particulars; complainant to have costs in lower court. Neither party to have costs here.

GRANT, J., did not sit. The other justices concurred.

SMITH et al. v. YOUMANS et al.

(70 N. W. 1115.)

Supreme Court of Wisconsin. April 30, 1897.

Appeal from circuit court, Walworth county; Frank M. Fish, Judge.

Suit by Shea Smith and others against Henry M. Youmans and others for an injunction. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action to restrain the defendants from in any way or manner drawing down or lowering the water in Lake Beulah, so called, and is brought by a large number of riparian proprietors on and along the waters of said lake against the owners and lessee of a certain dam at or near the outlet, whereby the waters of the lake were raised to a sufficient level to create a water power for milling purposes. Upon a trial of the issues joined there was a finding of facts, in substance: That Lake Beulah, as it now exists, originally consisted of two meandered lakes, which were separated by a strip of marsh about 80 rods wide, through which ran a small stream. The outlet of the more northerly of the lakes was by a small stream called Beulah river, which runs northerly, and then easterly until it empties into Mukwanago creek, and said creek runs into Fox river. In 1838 a dam was built across the outlet of said lake at about the point where it left the lake, and the waters of the lake were raised a few feet, creating power for a sawmill erected at the dam. After 1846, and before 1852, the original outlet was closed by an embankment, and has ever since so remained, and an artificial outlet to said lakes was created, at which point another dam was created, raising the waters in said lake to the height of 6 feet above their natural level, and 18 inches higher than by the former dam, creating a body of water known as "Mill Lake," and a new and artificial outlet for the said lakes, so that their waters, after passing over such dam, flowed by a new channel into said Beulah river, and in consequence of such dam the waters of the said two lakes were so raised as to flood to a considerable depth the marsh land formerly separating them, and making of them one body of water upwards of three miles in length, and varying in width from a quarter of a mile to one mile and a quarter, and with an area of about 900 acres. All these changes were made by Ball & Mower, the remote grantors of H. A. Youmans, under and through whom the defendants claim their rights and interests; and Ball & Mower built upon a site near said dam a grist mill, which was used and operated by the power thus provided until it was destroyed by fire in 1876. That the owners of the said dam and mill site at all times thereafter until shortly before the commencement of this action maintained the level of the water in said lakes at the point to which it was raised by said dam, save only as it was raised by freshets or unusual rains, or was lowered, as hereinafter stated, by draft of water through the said dam for use at said mill. By the construction and maintenance of said dam, and such consequent raising of the level of waters in said lakes, portions of the lands owned by certain of the plaintiffs and the grantors of certain others of them were flowed and submerged by such dam owners continuously, adversely, and uninterruptedly and notoriously, exclusively of any other right, under claim of right for more than 40 years, and at all times during that period the said level to which the waters were so raised by said dam was substantially and constantly maintained; so that said Youmans and his said grantors and his heirs and devisees acquired a right by prescription to so flow said lands, both as against the owners of lands bordering on said lakes and as against riparian owners below said lands. One effect of the construction of said artificial outlet, and the diversion thereto of the natural flow of the waters of said lakes, and the construction and maintenance of said dam and embankment, was to deepen the waters of the lakes, and set said waters up and back against the hard and higher banks, and to make said lakes navigable for row boats, small sail boats and steam launches, and to make the banks eligible and desirable sites for summer cottages and summer resorts, and to make said lakes a desirable place for fishing, boating, and recreation, and to make the margin of the lake touch the grassy banks, and submerge the boggy and marshy shores, as they before existed, and to render the banks readily accessible by small row and pleasure boats. About the year 1888, and from time to time thereafter, sundry of the plaintiffs, relying upon said conditions, and the level of the lake as then existing, and as having so uniformly existed for more than 40 years, built summer homes for themselves and families, or summer resorts for recreation, and purchased divers lots and parcels of land fronting and bounded on said lakes for that purpose, and made divers and sundry valuable improvements on said lots to that end, as did many other persons. That certain other plaintiffs named owned lots and lands bounded by said lakes, and had owned the same from an early day. That said lands, for agricultural purposes, were worth not more than $50 per acre, but for the purposes aforesaid, with the level of said lakes as thus maintained, were worth from $1,000 to $2,000 per acre. The dam belonging to the defendants Youmans, Haight, and West consists of an embankment of earth, with two openings, one for a flume, and the other for a waste weir, and are planked on the bottom and sides, and after the destruction of the mill, and until a short time before the action was brought, were kept closed by bulkheads, backed up with

gravel; and after the destruction of the mill in 1876 the power created by the dam had not been used. The defendant John Howitt is, and for many years has been, the owner of a grist mill at Mukwanago, upon a stream into which said Beulah river empties, about five miles below said dam, which is, and for 40 years past has been, driven by water power created by a dam across the said stream; and said Howitt, September 16, 1891, took from H. A. Youmans, then the owner of the dam and mill site at the foot of said lakes, a lease of the water power and water rights there created, and which still remained in force, and by it he was to expend a certain sum annually on the dam, flumes, and weirs of said water power, and was to do certain other work thereon. If the bulkheads were to be removed, and the water allowed to run freely through said dam, the level of the water in the Beulah Lake would be drawn down to a point over three feet below the lowest point to which the water was drawn in the operation of the mill formerly there maintained; and, if the dam should be removed, the said waters would fall to a point four feet further. The lowest point to which the waters were drawn, or could be drawn consistent with the operation of said mill, was a point 33 inches above the floor of the flume, where said bulkhead crosses the same in the western opening in said dam; and the waters of the lake were continuously maintained at that point, until the defendants took out the bulkheads, a short time before this action was commenced, and drew down the waters of the lake to the level of the floor of said flume, to the great injury of the plaintiffs. That lowering the waters of said lake will substantially impair the value and availability of the parcels and lots of land owned by the plaintiffs and bounded on the lake; the waters will recede from its banks, and in almost all places strips of slimy, boggy, and marshy shore will be uncovered, preventing access by boats to the plaintiffs' piers, and will substantially impair, and well-nigh destroy, the beauty of the lake, and its adaptation and availability for summer residences and summer resorts, and make the vicinity unhealthful, and render the plaintiffs' improvements practically valueless for the purposes for which they were constructed. Shortly before the action was commenced, said bulkheads were replaced to the height of two feet or more, and so that the waters of the lake rose and overflowed the bulkheads. The plaintiffs asked judgment that the defendants, their agents, etc., be perpetually restrained from in any way raising, taking out, or removing from the said dam any of the bulkheads or waste or flash boards in or on the same, and from in any way throwing down, lowering, or opening the dam, and from in any way interfering with or drawing down the water in Lake Beulah. The defendants insisted upon their right to use and withdraw the waters of said lake according to their needs and discretion. Judgment was given perpetually restraining the defendants, their agents, etc., from doing any of the acts mentioned so as to permit or allow the flow of water from the lake at a level below the point named, 33 inches above the floor in the flume, etc., and for costs; from which the defendants appealed.

Ryan & Merton and T. W. Haight, for appellants. D. S. Tullar and Quarles, Spence & Quarles, for respondents.

PINNEY, J. (after stating the facts). It clearly appears that H. A. Youmans, the lessor of the defendant Howitt, and ancestor through whom the other defendants derived their rights to the mill power and water rights and privileges in question, acquired a right by prescription, or an easement, to maintain the waters of Lake Beulah at the level to which they were finally raised, and at which they had been maintained for a period of over 40 years, and consequently to set the waters of the lake back against and over and upon the lands of the riparian proprietors, the plaintiffs and others, on the lake, for the purpose of creating and maintaining the necessary power for propelling a grist mill. His mill site, dam, and appurtenances constituted the dominant estate, and the right which he acquired was an easement in the one estate, and a servitude upon the estates of other riparian owners. Washb. Easem. 5. It seems to be a fair inference that such riparian owners, in view of the advantages that might or would accrue to them by raising the level of the waters of the lake by the dam in question, were induced to consent or acquiesce therein, and in the user of the dam and waters of the lake by Youmans and his predecessor in interest until their acts had ripened into an easement by prescription. The relative relations and interests of the parties which have thus originated, grown up, and become fixed by prescription, would seem to impose upon the parties reciprocal rights and duties, at least to the extent that, so long as such relative rights exist and are asserted, each party is bound in equity to abstain from doing anything to the prejudice of the other's rights, founded upon the relations thus created between them, and that they are equitably bound to deal fairly, reasonably, and justly with each other in respect thereto. It has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained. The water course, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural water course prescriptively; and "when a

riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel, to the injury of other proprietors along such channel, who have erected works or cultivated their lands with reference to the changed condition of the stream, or to the injury of those upon the artificial water course who have acquired by long user the right to enjoy the water there flowing." Gould, Waters, § 225, and cases there cited. It is upon this ground that when the natural outlet of Lake Beulah was closed, and so remained for over 20 years, the artificial outlet at that time opened, and since maintained during that period, became the natural outlet, with all its legal incidents and consequences. In Belknap v. Trimble, 3 Paige, 577, 605, it was held "that the rule must be reciprocal; that the proprietor of land at the head of a stream, who changes the natural flow of water, and has continued such change for 20 years, cannot afterwards be permitted to restore the flow of water to its natural state, when it will have the effect to destroy the mills of other proprietors, which have been erected in reference to such change in the natural flow of the stream." Washb. Easem. *313-315. In Mathewson v. Hoffman, 77 Mich. 421, 434, 43 N. W. 879, the rule thus stated in Belknap v. Trimble, supra, was approved. Lampman v. Milks, 21 N. Y. 505; Roberts v. Roberts, 55 N. Y. 275. It is also supported by Delaney v. Boston, 2 Har. (Del.) 489–491; Middleton v. Gregorie, 2 Rich. Law, 631–637. In Washb. Easem. *313–315, the learned author lays it down that: "Where one who owns a water course, in which another is interested, or by the use of which another is affected, does, or suffers acts to be done, affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another, who has been led to act by what he himself had done or permitted, the courts often apply the doctrine of estoppel; and equity, and sometimes law, will interpose to prevent his causing such change to be made." In Woodbury v. Short, 17 Vt. 387, it was held that, where a diversion of the stream affects other proprietors favorably, and the party on whose land the diversion is made acquiesces in the stream running in the new channel for so long a time that new rights may be presumed to have accrued, or have accrued, in faith of the new state of the stream, the party is bound by said acquiescence, and cannot return the stream to the former channel. Ford v. Whitlock, 27 Vt. 265; Norton v. Volentine, 14 Vt. 246. These cases relate, it is true, to diversions of water in running streams, but we are unable to perceive any reason why the same principle is not equally applicable to changes made in the level of a lake or pond, where, by means of a dam, the natural level has been raised for hydraulic purposes. The maintenance of the higher level of waters in the lake for the period of prescription secured to the owners of the mill site an easement in their favor to keep up the water to the necessary level to furnish water power for their mill. So, on the other hand, the riparian owners above have enjoyed, without question or interruption, for the same period of time, the advantages resulting from the flooding and submersion of their lands, by which the depth of water in the lake was greatly increased, and low, boggy, swampy, and unsightly lands were flooded, so that the waters extended to the high banks, whereby their access to and from the lake was improved, and the adjacent lands, with the resulting amenities and advantages, have been rendered extremely desirable for the particular use for which they have been improved at great cost and expense, namely, for summer resorts, relying upon the continued level of the water in the lake without change, without which they would be deprived of the greater portion of their present value. May it not be justly said that the respective tenements or estates, by the acts of their respective owners, have become each dominant, and each servient to the other in respect to the respective easements and advantages thus acquired by them, and enjoyed during the usual prescriptive period? In the case of Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297, 48 N. W. 371, this court held that one who owns land on the shores of an inland lake, which is valuable for use as a pleasure resort, on account of its proximity thereto, and the easy access to its waters for boating and fishing, can maintain an action to restrain other riparian proprietors from so drawing off the waters of the lake as to lower its level, and leave a wide margin of bog, covered with decaying vegetation, along its shores, making it repulsive in appearance and unhealthy in effect, and thus injurious to the plaintiff's property; and this was so held in view of the relative rights and duties of the riparian proprietors, and not because of the restrictive grant of power to the corporation, one of the defendants. It is true that this was held in relation to an attempted change in the natural level of Cedar Lake, but the conclusion seems irresistible that the increased level of the lake, in view of the facts found, by parity of reasoning from the adjudged cases referred to in relation to streams, must be esteemed as having the legal incidents of the natural level; certainly so long as the defendants retain and insist upon their easement to keep and maintain the dam at a height to keep up such new level in the lake. They have not and do not propose to abandon or surrender this easement. They are certainly bound to exercise their rights in a fair and reasonable manner, and as they had been accustomed to do, and not capriciously or wantonly, so as to prejudice the existing rights and interests of the plaintiffs as riparian owners. The judgment of the circuit court is in accordance, we think, with sound principles, and the doctrines recognized and enforced in such and similar cases in courts of equity. We have no doubt but that the de-

fendants may abandon their water rights and easement, so as to escape all liability at law for consequent damages, if they are not bound by law or agreement to maintain the higher level of the waters of the lake. It was held in Mason v. Railway Co., L. R. 6 Q. B. 578, that the owners of the servient estate could acquire, by the mere existence of the easement, no right, as against the owner of the dominant tenement, to the continuance of its use and exercise, as in the case of an easement for diversion of water; that he had the right to abandon the exercise and use of his easement, as it was not compulsory. But here, as stated, there has been no abandonment or surrender, and the case must be determined upon the equitable grounds arising out of the special facts found by the trial court.

2. As to the defendant Howitt, it is necessary only to observe that he stands, in respect to his lease, in the same plight and condition of his lessor, and with no other or greater rights. He has no right, under the lease, to use the dam, bulkhead, etc., as a reservoir to accumulate water in a manner not permissible to his lessor, or to accumulate and hold water for his mill on the stream below, in order to discharge it irregularly, and in great volumes, as may suit his convenience, thus drawing down wholly, or in great part, the waters of the lake to the level of the flume. As a riparian owner on Mukwanago creek below, he has no such right, but is entitled only to the accustomed flow of the water as it had been wont to run, without material alteration or diminution, and to his mill on the stream below (Kimberly & Clark Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373), all of which he obtains by the flow of the water over the dam or waste gates. For these reasons we think that the judgment of the circuit court is correct. The judgment of the circuit court is affirmed.

OCEAN GROVE CAMP MEETING ASS'N v. COMMISSIONERS OF ASBURY PARK.

(3 Atl. 168, 40 N. J. Eq. 447.)

Court of Chancery of New Jersey. Oct. Term, 1885.

On order to show cause why injunction should not issue.

R. Ten Broeck Stout, for complainants. D. Harvey, Jr., and J. F. Hawkins, for defendants.

BIRD, V. C. More than 15 years ago the complainants purchased a large tract of land fronting upon the ocean, chiefly for the purposes of a summer resort to exercise the right of worship. The enterprise has so grown that in winter it has a population of about 5,000, and in summer of 10,000 or 15,000. The authorities soon discovered that, to preserve the good health of the residents and visitors, it was absolutely necessary to improve their water-supply and sewerage system. To do this they bored for water, and at the depth of over 400 feet struck water which gave them a flow of 50 gallons per minute at an elevation above the surface of 28 feet. This they carried into the city by means of pipes, and supplied therewith about 70 hotels and cottages. They also applied it to the improvement of their sewerage system. The volume of water thus produced continued to flow undiminished in quantity and with unabated force until the action of the defendants now complained of, and to restrain which the bill in this cause was filed. The Commissioners of Asbury Park, a corporate body, purchased a large tract of land immediately north of and adjacent to the tract owned by Ocean Grove. Under their management, this, too, has become a famous seaside resort. Its population is equal to, if not greater at all times than, that of Ocean Grove. The authorities saw a like necessity for an increased supply of wholesome water. They entered into a contract with others, a portion of these defendants, to procure for them water by boring in the earth. These, their agents, sank several shafts to the depth of over 400 feet without satisfactory success. One shaft yielded about 4 gallons to the minute, and another, which yielded the most, only 9. All of the wells were upon the land and premises of the Asbury Park Association. It became evident, and is manifest to the most casual observer, that these wells would not supply the volume of water needed. It was also manifest that the experiment to procure water by digging upon their own land had been quite reasonably extended, although not so complete as to satisfy the mind that they cannot obtain water on their own premises as well as elsewhere, since it is in evidence that there are two wells on their premises, sunk by individuals, which produce 15 gallons each per minute, being as much in quantity as they procure from the well which is complained of. Failing in their efforts upon their own premises, they go elsewhere, on the land owned by individuals, and, procuring a right from individual owners, sink a shaft upon the public highway, near to the land of the complainants, and within 500 feet of the complainants' well. This bore extended to the depth of 416 feet, within 8 feet of the depth of complainants' well. At this depth they secured a flow of water at the rate of 30 gallons per minute, and the supply from the complainants' well was almost immediately decreased from 50 gallons to 30 per minute. The diminution in water was immediately felt by many of those who depended for a supply from this source in Ocean Grove. The Asbury Park authorities propose to sink other wells still nearer the well of complainants. This bill asks that they may be prohibited from so doing, and that they may be commanded to close the well already opened, which, it is alleged, is supplied from the same source that the complainants' well is supplied from.

The complainants are first in point of time. They are upon their own land and premises. They procure water from their own soil to be used in connection with their said premises, in the improvement and beneficial enjoyment of their occupation. In this they have exercised an indefeasible and unqualified right. It matters not whether the water which they obtain is from a pond or under-ground basin, or only the result of percolation, or from a flowing stream. The defendants went from their own land upon the land of strangers, and obtained permission to bore for water, and there sink their shaft, procuring water from the same source that the complainants procured their water, and diverted it and carried it to their premises, three-eighths of a mile, for use. Can they be restrained from doing this? A very careful consideration of a great many authorities leads me to the conclusion that they cannot at the instance of the complainants. Ang. Water-Courses, §§ 109–114, inclusive; Gould, Waters, § 280; Ballard v. Tomlinson, 26 Ch. Div. 194; Chasemore v. Richards, 7 H. L. Cas. 349, 5 Hurl. & N. 982; Acton v. Blundell, 12 Mees. & W. 324; Chase v. Silverstone, 62 Me. 175; Roath v. Driscoll, 20 Conn. 533; Village of Delhi v. Youmans, 45 N. Y. 362; Goodale v. Tuttle, 29 N. Y. 459; Wheatley v. Baugh, 25 Pa. St. 528; Frazier v. Brown, 12 Ohio St. 294.

The courts all proceed upon the ground that waters thus used and diverted are waters which percolate through the earth, and are not distinguished by any certain and well-defined stream, and consequently are the absolute property of the owner of the fee, as completely as are the ground, stones, minerals, or other matter to any depth whatever beneath the surface. The one is just as much the subject of use, sale, or diversion as the other. The owner of a mine encounters innumerable drops of water escaping from every crevice and fissure. These, when collected, interfere with his progress, and he may remove them, although the spring or well of the land-owner below be diminished or destroyed. So the owner or owners of a bog,

marsh, or meadow may sink wells therein, and carry off the waters collected in them, to the use or enjoyment of a distant village or town, although the waters of a large stream upon the surface be thereby so diminished as to injure a mill-owner who had enjoyed the use of the waters of the stream for many years. Upon these principles, there can be no doubt but that every lot-owner in Ocean Grove or Asbury Park could sink a well on his lot to any depth, and, in case one should deprive his neighbor of a portion or all of his supposed treasure, no action would lie. A moment's reflection will enable every one to perceive that such conditions or contingencies are necessarily incident to the ownership of the soil. In the case before me there is no proof that the waters in question are taken from a stream, and I have no right to presume that they are. The presumption is the other way. It seems to be my very plain duty to discharge the order to show cause, with costs.

WILLIS v. CITY OF PERRY.

(60 N. W. 727, 92 Iowa, 297.)

Supreme Court of Iowa. Oct. 22, 1894.

Appeal from district court, Dallas county; J. H. Henderson, Judge.

Action for damages caused by diverting water from a flowing well. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Shortley & Harpel, for appellant. White & Clark, for appellee.

KINNE, J. The undisputed facts in this case are that in 1888 plaintiff sunk a well on her lot in the city of Perry, Iowa, and secured a flow of water therefrom, which rose to a height of several feet above the surface of the ground. She erected a bath house, and piped the water from the well into said house and the bath tubs therein, and built up a large and profitable business. In 1890 one Blank sunk a well on his ground, near to plaintiff's well; and, very soon after, one Burrington sunk a well on his land near plaintiff's well. Both the Blank and Burrington wells were situated on ground considerably lower than was plaintiff's. Prior to the sinking of these last two wells, plaintiff had put a "goose neck" on her well, about 3 feet or 3½ feet high, and the water was discharged therefrom with great force and constantly. After the Blank and Burrington wells were sunk and had commenced to flow, the stream from plaintiff's well was lighter, and it would only raise three feet high. Plaintiff then lowered the goose neck so that it was about two feet high. In 1891 defendant city, for the purpose of supplying water to its citizens, sunk three wells on its grounds about a block from plaintiff's well. They were all four inches in diameter, and a flow of water was secured from each of them. In the fall of 1891 the city erected works and pumping machinery, and attached the same to said wells, and pumped from them such quantities of water as were needed for the city supply. After the city wells began flowing, and when they were left open, the water in plaintiff's well ceased to flow, and the water seems to have stood therein at about the level of the ground. When caps were put on the city wells, plaintiff's well would flow. The city wells were on lower ground than plaintiff's well. After the city attached its pumping machinery to its wells, and when it was pumping, there would be no flow at all from plaintiff's well, and this condition of affairs continued to exist for some length of time after the city ceased pumping. Sometimes, after the city had been pumping, it would be two or three hours, and at other times five or six hours, before the flow of water from plaintiff's well would begin. At times, when the city was not pumping, the caps would be removed from its wells, which would release the water, and permit it to flow and waste, and during these periods there was no flow from plaintiff's well. The Blank and Burrington wells appear to have been flowing most of the time, whether in use or not. Plaintiff's well was permitted to flow when it would, and the water wasted into the creek. Prior to the sinking of the city wells, plaintiff had used the water from her well for domestic purposes, and for giving baths in her bath house, and had sold some of the water. She had also used it in washing for her bath house. At first the water was carried in buckets to the bath house, but afterwards it was forced by steam and mechanical appliances from the well into tanks in the bath house. These appliances are thus described by a witness: "The first siphon was used to raise the water to the tanks for heating. The siphon was attached to the pipe about two feet above the surface of the ground, and then there was a horizontal pipe about ten feet long running from it to the well, and which was lowered about a foot or a foot and a half after the city wells were put in. Steam was conducted from the boiler through a pipe into the siphon, and then the water was forced out into the tank and distributed." There is a conflict in the testimony as to what efforts plaintiff made to secure water from her well after the city wells were sunk and being operated; but we think it fairly appears that she put in a larger boiler, and made certain other changes in the machinery, and she claims that she could not draw the water when the city was pumping, and that by reason of the sinking of the wells by the city, and its permitting them to flow, and by pumping water from them, she was deprived of water, for all purposes, for over half of the time. The defendant claims that plaintiff, with her machinery and appliances, if properly operated, could at all times have supplied herself from her well with an abundance of water for all purposes. Plaintiff claims special damages in the sum of $116.55, expended in order to save herself from damages by reason of defendant's acts. Defendant denies that it diverted the water from plaintiff's well, and avers that in all respects it, in sinking its wells and in using them, exercised prudent care and caution to the end that the water should not be wasted, and that it used only so much of said water as was necessary to supply the demands and needs of said city; denies that its use of the water interfered with plaintiff's use of her bath house, or, if it did so, it was only for one or two hours each day, and while the defendant was pumping water from its wells into its stand pipe; that there is at all times in the subterranean stream ample and sufficient water to supply all the wants of plaintiff. A jury trial was had, and a verdict rendered for plaintiff for $475, and judgment was entered thereon, from which defendant appeals.

2. While, in the issues as made, the question as to these wells being all supplied from the same subterranean stream is in contro-

versy, still the cause was tried upon the theory that all of these flowing wells were in fact supplied from one and the same subterranean stream, and, indeed, so far as appears from the record, it would seem that the indications all tend to sustain that theory. In deciding the questions presented, we must determine by what rule of law the rights of the parties to this unseen stream of water are to be measured. Subterranean water courses are of two classes: First, those whose channels are known or defined; and, second, those whose channels are unknown and undefined,—and the principles of law governing the former are not applicable to the latter. Kin. Irr. § 48. If, in fact, or by reasonable inference, it is known that a subterranean stream of water flows in a well-defined channel, capable of being distinctly traced, it is said to be governed by the rules of law applicable to streams flowing upon the surface of the earth. Such is the general rule, to which, however, we think there are some exceptions, which will hereafter be considered. Burroughs v. Saterlee, 67 Iowa, 400, 25 N. W. 808; Kin. Irr. § 48; Black's Pom. Water Rights, § 67; Gould, Waters, § 281; Washb. Easem. p. 516; Ang. Water Courses, § 112; Dickinson v. Canal Co., 7 Exch. 282; Chasemore v. Richards, 2 Hurl. & N. 186; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., 1 Sawy. 470, Fed. Cas. No. 2,989; Smith v. Adams, 6 Paige, 435; Mason v. Cotton, 4 Fed. 792; Trustees, etc., v. Youmans, 50 Barb. 320; Wheatley v. Baugh, 25 Pa. St. 531; Dudden v. Guardians, etc., 1 Hurl. & N. 627; Frazier v. Brown, 12 Ohio St. 300; Hanson v. McCue, 42 Cal. 303; Strait v. Brown, 16 Nev. 321; Whetstone v. Bowser, 29 Pa. St. 59; Saddler v. Lee, 66 Ga. 45; Acton v. Blundell, 12 Mees. & W. 324; Haldeman v. Bruckhart, 45 Pa. St. 514; Hale v. McLea, 53 Cal. 578. The general rule governing surface streams is that "prima facie every proprietor on each bank of a river is entitled to the land covered with the water to the middle of the thread of the stream, or, as is commonly expressed, 'usque ad filum aquae.' In virtue of this ownership, he has a right to the use of the water flowing over it, in its natural current, without diminution or abstraction; but, strictly speaking, he has no property in the water itself, but a simple use of it as it passes along." Tyler v. Wilkinson, 4 Mason, 400, Fed. Cas. No. 14,312; Kin. Irr. § 59, and cases cited. In other words, every riparian owner has a right to use the water in the stream as it passes along, and an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention, or substantial diminution, either in quality or quantity, and none of such owners have the right to use the water to the prejudice of the others, unless such a right has been acquired by license, grant, or prescription. Kin. Irr. § 60; Gould, Waters, §§ 213, 214; Ang. Water Courses, § 93; Heath v. Williams, 25 Me. 209; 43 Am. Dec. 275, and notes; Garwood v. Railroad Co., 83 N. Y. 405; Ware v. Allen, 140 Mass. 513, 5 N. E. 629, and notes; Railroad Co. v. Miller, 112 Pa. St. 34, 3 Atl. 780, and note; Gould, Waters, § 204; 3 Kent, Comm. 439; Blanchard v. Baker, 8 Greenl. 266; Bealey v. Shaw, 6 East, 208, 214; Pope v. Kinman, 54 Cal. 3; Plumleigh v. Dawson, 1 Gilman, 544; Wheatley v. Chrisman, 24 Pa. St. 302; Weiss v. Steel Co., 13 Or. 496, 11 Pac. 255.

Now, each riparian owner has a right to use the water of a surface stream for ordinary or natural uses, and, under certain circumstances, for artificial uses, such as for irrigation and the like; and the better law seems to be that he may use the water for his natural and ordinary wants, regardless of the effect upon other proprietors on the stream; that is, as we understand the rule, one riparian proprietor may, for his natural wants, if necessary, use all of the water in a surface stream, to the exclusion of every other such proprietor, certainly so as against the other proprietor using the water for artificial purposes. Pom. Rip. Rights, § 125; Spence v. McDonough, 77 Iowa, 462, 42 N. W. 371; Kin. Irr. §§ 65, 66; Gould, Waters, § 205; Ang. Water Courses, § 93; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900. In case, however, such a proprietor puts the water to an extraordinary or artificial use, he must do so in such a manner as not to interfere with its lawful use by others above or below him upon the same stream. Kin. Irr. § 65; Ang. Water Courses, § 93. As to extraordinary or artificial uses, the rights of all proprietors on the stream are equal (Gould, Waters, § 206, and cases cited; Dumont v. Kellogg, 29 Mich. 422); and the artificial use is held to be always subordinate to the natural use. If there is not water enough to more than supply the natural wants of the several riparian owners, none can use the water from the stream for artificial purposes. Ordinary or natural uses have been held to include the use for domestic purposes, including household purposes, such as cleansing, washing, and supplying an ordinary number of horses or stock with water, and it is said that natural uses are limited to the purposes above stated. Kin. Irr. § 66, and cases cited; Black, Pom. Rip. Rights, § 138, and citations; Gould, Waters, § 205; Ang. Water Courses, § 93; Garwood v. Railroad Co., 83 N. Y. 405; Stanford v. Felt, 71 Cal. 250, 16 Pac. 900. Now, what is a reasonable use of the water of a surface stream for artificial purposes? Clearly, such a use as permits the return of the water used to the stream in its natural channel, without corruption or sensible diminution in quantity. By this is not meant that all the water must be returned to the stream, because in the use some will necessarily be lost or wasted. What is or constitutes such reasonable use must be determined in view of the size and capacity of the stream, the wants of all other proprietors, the fall of the water,

the character of the soil, the number of proprietors to be supplied, and all other circumstances. In no case, however, is reasonable use to be determined in view of the necessities or business of any one proprietor, but the rights of each in the stream for artificial uses are to be determined in view of all of the circumstances as affecting all of the proprietors. Kin. Irr. § 76, and cases cited; Jones v. Adams, 19 Nev. 78, 6 Pac. 442; Para Rubber-Shoe Co. v. City of Boston, 139 Mass. 155, 29 N. E. 544. As one who uses water from a well supplied from a subterranean stream cannot return to such stream the water he may use, or any part of it, it follows that the rules of law governing the use of water from surface streams cannot in all respects be said to control in a case like that at bar. As to a surface stream, the riparian owner may use the entire stream for extraordinary purposes, provided he seasonably, and without sensibly diminishing its volume or impairing its quality, returns it to its accustomed channel. But in this case he could have no such right, else he might for artificial purposes exhaust the entire stream, to the detriment of other well owners situated thereon, and who would be entitled to the use of the water for domestic purposes, as against any artificial use. It seems to be conceded that the use of the water by the city was an unusual and extraordinary use; that it was not what is spoken of in the books as a natural use, for, if it was, then the city would, under the authorities cited, be entitled to use all of the water if it needed it. Was not plaintiff's use of the water an extraordinary and artificial use, in so far as she used the same for the purpose of operating her bath house and steam washer for washing bathing towels? We think it was. If such a use can be treated as a natural use, as for domestic purposes only, then she might thus exhaust the entire stream, to the damage of all others having the right to use it even for natural uses. Just what is or is not an artificial use cannot be defined so as to cover all cases that may arise, but it is not easy to discern the difference in principle between the use of water for manufacturing purposes, which is usually held to be an artificial use, and its use for operating a bath house. Neither use is for domestic purposes, as ordinarily understood. Applying the law to the facts of this case, we think it is clear that, for any damage done by defendant to plaintiff in depriving her of the free and accustomed use of the water in her well for the usual domestic purposes, the city would be liable, because, in any event, its use of the water was for extraordinary and artificial purposes. Whether defendant would be liable for using its wells in the supplying of water to the inhabitants of the city, thereby at times interfering with plaintiff's supply of water for the purpose of operating her bath house, depends upon the reasonableness of defendant's use of its wells. As to this, we have already seen that the reasonableness of the use is not to be measured by the wants or necessities of the defendant, but it is to be determined in view of all the facts and circumstances, and in view of the number and wants of other well owners on the stream. It does not appear that there are any wells tapping this subterranean stream other than those heretofore mentioned; nor does it appear with any degree of certainty as to what were the wants or needs of the owners of the Blank and Burrington wells. It appears that defendant pumped from its wells from 200 to 1,000 gallons of water each day, and that when the pumping was going on, and for several hours afterwards, no water flowed from plaintiff's well. As near as can be ascertained from the evidence, plaintiff required about as much water for her bath house as the city was using. The city's plant was new. It had as yet but few consumers of water. Each party, for artificial purposes, had an equal right to use the water, and each was bound to so exercise that right as to cause the other the least inconvenience and damage. From the nature of the case, neither of the parties being able to return the water to the stream from whence it came, the reasonableness of the use is to be determined in view of that as well as other facts. Both having an equal right to the water for artificial uses, neither could so exercise that right as to wholly deprive the other of its use at any time. We think the evidence shows that the city not only deprived the plaintiff of the use of her well for domestic purposes for much of the time, but it also deprived her entirely of its use for a portion of the time for her bath house.

3. Plaintiff and her husband, as witnesses on the stand, were permitted, against defendant's objection, to testify as to the profits made from the bath business. Other witnesses, also, against defendant's objections, testified to the use and extent of the patronage of the bath house. It is said that evidence of profits is too remote, is speculative, and not the proper measure of damages. Doubtless, in such a case, the rental value of the bath house for the time plaintiff was deprived of its use by defendant's acts would be the measure of her damages. But how is rental value to be shown in such a case if not from the character and extent of the use of the building? In Sutherland on Damages (volume 1, § 70) it is said: "The law, however, does not require impossibilities, and cannot therefore demand a higher degree of certainty than the nature of the case admits. If a regular and established business is wrongfully interrupted, the damages thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of." In Wolcott v. Mount, 36 N. J. Law, 262, it is said that the earlier cases, "both in English and American courts, concur in excluding, as well in actions in

tort as in actions on contracts, from the damages recoverable, profits which might have been realized if the injury had not been done or the contract had been performed. This abridgment of the power of courts to award compensation adequate to the injury suffered has been removed in actions of tort. The wrongdoer must answer in damages for those results, injurious to other parties, which are presumed to have been within his contemplation when the wrong was done." This rule is well supported by the authorities. Gibson v. Fischer, 68 Iowa, 31, 25 N. W. 914; Sedg. Dam. p. 80, note 1; Hamer v. Knowles, 30 L. J. Exch. 102; Bridge v. Fisk, 23 N. H. 171; Chandler v. Allison, 10 Mich. 460; Wood, Nuis. 892; Dubois v. Glaub, 52 Pa. St. 238; Fultz v. Wycoff, 25 Ind. 321; Park v. Railroad Co., 43 Iowa, 636; Simmons v. Brown, 5 R. I. 299; White v. Mosely, 8 Pick. 356; Gladfelter v. Walker, 40 Md. 3; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Holden v. Lake Co., 53 N. H. 552. In the case of City of Terre Haute v. Hudnut, supra, this question was elaborately discussed, and the authorities collected. It is there said, in speaking of past profits: "What exists in the present or has existed in the past cannot be considered a matter of speculation." It was said by Seevers, J., in Gibson v. Fischer, supra: "Besides this, the rental value must depend on and be measured by the extent of the profits. If there was absolute certainty in human evidence, the one should amount to precisely the same as the other. When the profits are ascertained, the value of the use or rental value is certainly known." We conclude, then, that the evidence as to past profits was properly admitted, not as fixing the measure of damages, but to assist the jury in estimating the damages. In determining damages in a case like that at bar, what evidence would be adduced which would better enable the jury to determine plaintiff's damages than to show what the business had earned? Rental value is of necessity dependent upon what can be made out of a business or property for the uses for which it is devoted or adapted. These net earnings covering a period of several months before the injury, while by no means conclusive as to the rental value, furnish a fairly safe basis from which to estimate the damages. If, as is contended, the erection of defendant's waterworks resulted in the building and opening of other bath houses, or in the putting in of bath tubs in private residences, whereby plaintiff's patronage would have been lessened, such facts could have been shown. For the same reasons, it was proper to show the extent and character of the patronage of plaintiff's bath house.

4. It is urged that past profits should not have been shown, because it appeared that, by a moderate expenditure of money, plaintiff could have saved herself from loss, and that it was her duty so to do. Mill Co. v. Greer, 49 Iowa, 497; Douglass v. Stephens, 18 Mo. 362; Railway Co. v. Finnigan, 21 Ill. 646; Loker v. Damon, 17 Pick. 284; Thompson v. Shattuck, 2 Metc. (Mass.) 615. In this case much testimony was offered touching the ability of plaintiff, by the aid of mechanical appliances, to raise the water from the well when it was lowered by defendant's acts. We think there is a fair conflict in the evidence as to whether, by a reasonable effort and expenditure of money, plaintiff could have avoided the damage resulting from defendant's unwarranted diversion of the water. The question was properly submitted to the jury, and they have said, in effect, that she could not have done so. The finding is not without support in the evidence, and we cannot disturb it.

5. Error is assigned on the action of the court in refusing to permit defendant to show that it offered to furnish her free of charge all the water she could use in running her business. This offer was made to plaintiff's husband. The husband operated the business in his name, and appears to have had entire control of it, as well as of plaintiff's interest, relating to her well. While it may be conceded that it was plaintiff's duty to use reasonable efforts as to time and expenditure of money to lessen or limit her injury, we do not think she was called upon to take water from defendant's pipes. Her right was to take water from her own well, and, even if it was incumbent upon her to take water from the city free to limit her injury, her damages could not be affected by her failing to do so, in the absence of any showing as to whether or not the cost to her of taking the water from the city would be reasonable. There is nothing in the record which shows, or tends to show, what expense she would have been put to, if she took the water from the city, in connecting with the mains and in providing the necessary appliances for such a change; so that, in any event, defendant has not made such a showing as would require plaintiff's acceptance of the city's offer. The evidence was properly excluded.

6. Complaint is made that the court, in its instructions, ignored the rule as to contributory negligence, and improperly refused an instruction asked, to the effect that if, during the time for which plaintiff complained, she allowed her own well to flow and waste water, and such waste of water contributed to the injury complained of, she could not recover. In support of the claim that this instruction should have been given, we are referred to the case of Ferguson v. Manufacturing Co., 77 Iowa, 576, 42 N. W. 448, and other cases. That was a case where the contributory negligence was pleaded by defendant. There is no such issue in the case at bar, and, for that reason alone, the instruction was properly refused. Furthermore, on principle, the cases are clearly dis-

tinguishable. No injury would have resulted to plaintiff if defendant's wells had been so arranged as to have discharged their water at the same level as plaintiff's, and if the city had not pumped from its wells. The waste of water from the wells discharging at the same level would not have affected the flow from any of them, or, if it did, the effect would have been the same as to all of them. Again, the evidence does not show that plaintiff's injury would have been in any way lessened by stopping the flow of her well when it did flow and was not in use. In any view, there was no error in giving and refusing the instructions complained of.

7. The court submitted to the jury the question as to whether the flow of water from the Blank and Burrington wells affected the flow from plaintiff's well. It is said that the evidence, without conflict, shows that the flow of these wells did affect plaintiff's well; that it was not a question of dispute. That is true, but the evidence did also tend to show that the flow of these other wells did not materially affect the plaintiff's use of her well. We think the instruction complained of is quite as favorable to the defendant as it had a right to ask.

8. In the sixth paragraph of the charge, the jury were told that the defendant, under certain circumstances, which were stated, would be liable for the cost of appliances purchased by plaintiff in her attempt to procure water from her well after the flow therefrom had been impaired by the defendant's acts. Defendant contends it would only be liable for the value of the use of such appliances while plaintiff retained possession of the property. It does not appear that these appliances added to the value of the property. In fact, the evidence shows that with their use plaintiff could not obtain water. Nor do we think it is shown what the value of said appliances was, if anything, after plaintiff's use of them. The latter part of the instruction reads thus: "If, however, the water could not have been obtained from said well by the use of such appliances, at reasonable and moderate cost, then the plaintiff would be entitled to recover as damages the value of the diminished use of said property during the time that she was entitled to the use, which would be from the date that the water was diverted from her well as alleged, to the date of the sale and surrender of the property, which was on March 15, 1892, also the reasonable cost, expenses of such appliances as were used and placed therein to diminish the damages to the use; and the defendant would only be liable for so much thereof as its acts had caused the damage to the plaintiff." It is said that the instruction should have read "diminution of the use," instead of "diminished use." Technically, it may be true that the words "diminished use" should be held to refer to the value of the use remaining after the diminution had taken place. In view of the wording of the entire instruction and of the other instructions given, we think the error, if any, was without prejudice. The jury could not from all of the instructions have failed to understand what was the correct measure of damages.

9. Complaint is made of the giving and refusal to give other instructions. We discover no error in the matters complained of.

Finally, it is urged that the verdict is excessive, and contrary to the law and the evidence. From what has already been said, it will be seen that we think the jury was justified in finding against the defendant. The verdict was not excessive, and was warranted by the testimony. The case is so unusual in its facts, and so important in principle, that we have given it a most thorough investigation and consideration. Affirmed.

LYMAN v. HALE.

(11 Conn. 177.)

Supreme Court of Errors of Connecticut. 1836.

Hungerford & Cone, for plaintiff in error. Johnson & Chapman, for defendant in error.

BISSELL, J. This writ of error is reserved for our advice; and the principal question raised and discussed, is, whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy.

It is admitted that the tree stands upon the plaintiff's land, and about four feet from the line dividing his land from that of the defendant. It is further admitted that a part of the branches overhang, and that a portion of the roots extend into, the defendant's land. If, then, he be a joint owner of the tree with the plaintiff, he is so in consequence of one or the other of these facts, or of both of them united. It has not been insisted on, in the argument, that the mere fact, that some of the branches overhang the defendant's land, creates such a joint ownership. Indeed, such a claim could not have been made, with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. "Thus," it is said, "if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more; for he can abate only that part which constitutes the nuisance." 2 Rolle, 144, 1, 30; Rex v. Pappineau, 2 Strange, 688; Cooper v. Marshall, 1 Burrows, 267; Welsh v. Nash, 8 East, 394; Dyson v. Collick, 5 Barn. & Ald. 600 (7 Serg. & L. 205); Com. Dig. tit. "Action on the Case for a Nuisance," D, 4. And in Waterman v. Soper, 1 Ld. Raym. 737, the case principally relied on by the defendant's counsel, it is laid down: "That if A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows in the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A."

The claim of joint ownership, then, rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground, the charge proceeded, in the court below; and on this, the case has been argued in this court. We are to inquire, then, whether this ground be tenable. The only cases relied upon, in support of the principle, are, the cases already cited from Ld. Raymond, and an anonymous case from Rolle's Reports. 2 Rolle, 255. The principle is, indeed, laid down in several of our elementary treatises. 1 Swift, Dig. 104; 3 Starkie, Ev. 1457, note; Bull. N. P. 84. But the only authority cited is the case from Ld. Raymond. And it may well deserve consideration, whether that case is strictly applicable to the case at bar; and whether it carries the principle so far as is necessary to sustain the present defence. That case supposes the tree to be planted on the "extremest limit"—that is, on the utmost point or verge—of A.'s land. Is it not then fairly inferable, from the statement of the case, that the tree, when grown, stood in the dividing line? And in the case cited from Rolle, the tree stood in the hedge, dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the land of another, they therefore become tenants in common of the tree? We think not; and if it were, we cannot assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principles to practice; and, in the next place, we think the weight of authorities is clearly the other way.

How, it may be asked, is the principle to be reduced to practice? And here, it should be remembered, that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone, which creates the tenancy in common. And how is the fact to be ascertained?

Again, if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportion do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriate all the products, on what principle is the account to be settled between the parties?

Again, suppose the line between adjoining proprietors to run through a forest, or grove. Is a new rule of property to be introduced, in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line; and whether he can safely cut them, without subjecting himself to an action?

And again, on the principle claimed, a man may be the exclusive owner of a tree, one year, and the next, a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so by the controlling force of authority. The cases relied upon for its support have been examined. We do not think them decisive. We will very briefly review those, which, in our opinion, establish a contrary doctrine.

In the case of Masters v. Pollie, 2 Rolle, 141,

it was adjudged, that where a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. The authority of this case is recognized and approved by Littledale, J., in the case of Holder v. Coates, 1 Moody & M. 112 (22 Serg. & L. 264). He says: "I remember, when I read those cases, I was of opinion that the doctrine in the case of Masters v. Pollie was preferable to that in Waterman v. Soper; and I still think so."

The same doctrine is also laid down in Millen v. Fandrye, Poph. 161, 163; Norris v. Baker, 3 Bulst. 178; see, also, 20 Vin. Abr. 417; 1 Chit. Gen. Prac. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant are not joint owners of the tree; and that the charge to the jury, in the court below, was, on this point, erroneous.

It is, however, contended, that although the charge on this point was wrong, there ought not to be a reversal, as upon another ground the defendant was clearly entitled to judgment in his favor.

It is urged, that land comprehends everything in a direct line above it; and therefore, where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them. And in support of this position, a number of authorities are cited. The general doctrine is readily admitted; but it has no applicability to the case under consideration. The bill of exceptions finds, that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the jury proceeds on the ground that he has a right so to do. Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use. Beardslee v. French, 7 Conn. 125; Welsh v. Nash, 8 East, 394; Dyson v. Collick, 5 Barn. & Ald. 600 (7 Serg. & L. 205); 2 Phil. Ev. 138.

On the whole, we are of opinion that there is manifest error in the judgment of the court below, and that it be reversed.

The other judges ultimately concurred in this opinion; WILLIAMS, C. J., having at first dissented, on the ground of a decision of the superior court in Hartford county (Fortune v. Newson), and the general understanding and practice in Connecticut among adjoining proprietors. Judgment reversed.

ROBINSON v. CLAPP.

(32 Atl. 939, 65 Conn. 365.)

Supreme Court of Errors of Connecticut. Jan. 8, 1895.

Appeal from court of common pleas, New Haven county; Cable, Judge.

Suit by John A. Robinson against John W. Clapp to enjoin defendant from erecting a certain house. There was judgment for plaintiff, and defendant appeals. Reversed.

Henry G. Newton and J. Birney Tuttle, for appellant. Earlliss P. Arvine, for appellee.

FENN, J. Upon the complaint of the plaintiff, claiming an injunction to restrain the defendant from doing certain acts on the defendant's own land, adjacent to land of the plaintiff, the court of common pleas for New Haven county found the following facts:

On September 21, 1883, one William Waite was, and for a long time had been, the owner in fee of certain premises on the northerly side of Bradley street in the city of New Haven, 61 feet front on said street, and 98 feet deep. A dwelling house stood on the westerly part of said lot. On said day said William Waite, through a third person, conveyed to his wife, Elizabeth, the westerly part of said lot, 40 feet front, on which said dwelling house stood. On August 23, 1888, the said 40-foot lot was, by warranty deed, conveyed to the plaintiff by an agent of Mr. and Mrs. Waite, to whom it had been previously conveyed for that purpose. On October 6, 1888, William Waite quitclaimed his right, title, and interest in the remaining 21 feet of the original lot to the defendant. On the boundary line between the premises of the plaintiff and the defendant there stands a maple tree of about 40 years' growth, about 16 inches in diameter, and with a branch extension of from 40 to 50 feet. This tree is a valuable one to the plaintiff as a shade tree and ornament, and shades a part of the plaintiff's premises. The boundary line runs substantially through the middle of the trunk of said tree. At the time that said William Waite erected said dwelling house,—which was more than 20 years previous to the plaintiff's purchase,—he dug and connected with said dwelling house, by pipes, a well, and used said well of water as appurtenant to said house during the period of his ownership, up to and within a short time previous to said purchase. For some five years previous to the plaintiff's purchase, and up to the time when said Waite ceased to use said well, such use was by means of a curb and bucket. The plaintiff has never used said well, which has been covered up ever since he has owned the premises. The defendant does not intend to destroy the well. At the time of the plaintiff's purchase, the well was connected with the house by means of pipes, and there was a concrete walk leading from the house to the well, across said boundary line, and continuing into that part of the premises owned by the defendant, along the extent of the flagstone that crowns the well. This stone, which is about 5½ feet in length, extends some 3½ feet upon the defendant's land. The well is 2½ feet in diameter, and adjoins the line, but is practically all of it upon the land of the defendant. On the trial the plaintiff and said William Waite both testified that a few days previous to the plaintiff's purchase, and while negotiations were pending, said Waite told the plaintiff that said well went with the house, and would be sold to him; and this statement was a substantial inducement to the plaintiff in making said purchase. To the admission of this evidence the defendant objected, but the court overruled the objection, and admitted the evidence, the defendant duly excepting, and the court found the facts to be as testified. The plaintiff's principal sitting room and the room over it, the dressing room, are on the east side of the house, and derive their light solely from a bay window, having its windows on the easterly, northeasterly, and southeasterly sides thereof. Said rooms are so inclosed on all sides by other parts of the structure that no other means of light than from the east side is possible, without a substantial reconstruction of that part of the building. The east face of said bay window is between five and six feet beyond the line of the side wall of the house from which such window projects, and is five feet from said boundary line. The stairway and hall of the dwelling house is lighted by a stained glass window in the easterly side of the house, and has also a glass in the south door. The defendant threatens and intends to build, and has made a contract for the building of, a dwelling house to extend down along the boundary line for a distance of 58 feet from a point about 6 feet from said Bradley street, the wall of which is to be about 20 feet high, and threatens to remove so much of the tree as is on his side of said boundary line. The construction of a dwelling house on the line, as the defendant intends to construct it, would cover the well, and that portion of the premises on his side of the line on which said tree stands; and the removal of that portion of the tree which the defendant threatens to remove would destroy the life of the whole tree. Such construction would also deprive the plaintiff of the supply of light which has come across said 21 feet now owned by the defendant, and would make it necessary for the plaintiff to light his sitting room and dressing room with gas, or some other light, in the daytime, in order to obtain sufficient light for the reasonable use of the rooms. At the time of purchase by the plaintiff, and at the time of the purchase by the defendant, there was no fence or other visible sign of demarcation marking said boundary line. And said original tract

of land owned by William Waite was, at the time of the erection of said dwelling house thereon, and ever afterwards until the execution of the deeds above mentioned, an undivided tract of land. The defendant, previous to his purchase, had lived within 100 feet of the premises, and was fully acquainted with the same. Upon these facts the court, overruling the claims of the defendant, rendered judgment for the plaintiff, enjoining and restraining the defendant "from such interference with the tree mentioned in the complaint as will destroy or injure the same, and such interference with the well mentioned in the complaint as will deprive the plaintiff of the use of the same; also from erecting any building upon the premises described as the property of the defendant, so near as to exclude the light from the plaintiff's dwelling house." The defendant's appeal assigns 11 reasons, some of which are not important. Taken as a whole, however, they present, in substance, four alleged grounds of error which we deem it necessary to consider. First, in restraining the defendant from interference with the tree; second, with the well, including the admission of evidence; third, from excluding the light; fourth, that the judgment rendered is uncertain. We will examine each of these, and in the order above indicated.

First, in reference to the tree. Upon the subject of the rights of the parties in a tree situated as this is it is said in 1 Washb. Real Prop. § 7a: "The law as to growing trees may be regarded so far peculiar as to call for a more extended statement of its rules as laid down by different courts. * * * In the first place, trees which stand wholly within the boundary line of one's land belong to him, although their roots and branches may extend into the adjacent owner's land. * * * But the adjacent owner may lop off the branches or roots of such trees up to the line of his land. If the tree stand so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property in common of the landowners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree." This is the doctrine of our own court in Lyman v. Hale, 11 Conn. 177, cited by Washburn. See, also, 26 Am. & Eng. Enc. Law, p. 558. We may therefore limit our investigation to the inquiry as to the logical application of the principles of that case to the present one. In that case the tree stood upon the plaintiff's land, but its branches extended some distance across the line, and some of its roots ran into the defendant's ground. The action was trespass quare clausum fregit for entering upon the plaintiff's land and picking up pears, the fruit of the tree. The defendant claimed to be either tenant in common or joint owner with the plaintiff, or exclusive owner of the pears gathered, which fell on his own land from overhanging branches. The claim of joint ownership urged rested on the fact that the roots extended into the defendant's ground, and that the tree derived a part of its nourishment from his soil. In reviewing and disapproving the authorities cited in support of such claim, this court said: "Is it the doctrine of these cases that whenever a tree growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they therefore become tenants in common of the tree? We think not; and, if it were, we cannot assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principle to practice; and, in the next place, we think the weight of authorities is clearly the other way. How, it may be asked, is the principle to be reduced to practice? And here it should be remembered that nothing depends upon the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely upon the inquiry whether any portion of the roots extend into his land. It is this fact alone which creates the tenancy in common. And how is the fact to be ascertained? Again, if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportions do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriate all the products, on what principle is the account to be settled between the parties? Again, suppose the line between adjoining proprietors to run through a forest or grove. Is a new rule of property to be introduced in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line; and whether he can safely cut them, without subjecting himself to an action? And again, on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth. It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle." We have quoted so much at length, because it must be obvious that by far the greater part of this most cogent reasoning applies with equal force against the doctrine of a tenancy in common of a tree standing upon the dividing line between two properties, and extending its body, no matter in what proportion, into each. It is true, the opinion appears to concede that in such a case the tenancy would exist, and such is the

familiar statement of the treatises and opinions. The expression is probably well enough and sufficiently accurate for practical purposes, but it is not entirely correct, as appears to us to be clearly shown in an article in the Albany Law Journal (volume 10, p. 226), which points out that where a tree stands partly on the lands of each of two adjoining proprietors, the possession of each must be always confined to that portion of the tree which is on his side of the boundary line, in view of the greater dignity and permanence of real-estate tenure, as compared with the temporary and changing nature of growing timber.

In addition to what we have said, it must be apparent that the very nature of things differentiates such a so-called common interest from an ordinary tenancy in common, either of real or of personal property. In the case of a tree like the one in question, yielding no fruit, of trifling value for wood, if cut, of no value while standing, except for ornament or shade, what relief by any remedy, legal or equitable, provided for ordinary tenants in common, can a part owner of such tree, to whom its continued existence is of no advantage but an injury, obtain? Can he call upon the other part owner to account for the benefit which he has derived from such ornament or shade? Could he, in this state, procure a partition of the growing tree as real estate, under Gen. St. § 1304? And if he did, would not the lines of his own and the adjacent land divide the tree as they did before, leaving the rights of the parties identical in effect with what they were before? Could he obtain a sale of the tree under section 1307, either as real estate or personal property, that would carry the right to have it destroyed or removed? If it be conceded, as it must be, that he could do none of these, it will be evident, we think, that the tenancy in common in a tree is of a peculiar nature, if there be such a tenancy at all. It would really seem to come to this: that each of the landowners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps rather identical with, the part which is upon his land; and, in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole. There may, it is true, be a difficulty in applying such a principle as this, and such difficulty appears to exist in the present case. It might perhaps fairly be urged that to prevent the defendant from removing that portion of the trunk of the tree upon his own land—thereby depriving him of the opportunity to build upon it as desired—would be likely to produce a greater irreparable injury to the defendant than such removal and the consequent destruction of the life of the tree would cause the plaintiff, and that, therefore, the equitable remedy of injunction (which is not adapted finally to adjust the rights of the parties) should have been refused, and the contestants left to settle such rights in methods pertaining to the legal, and not the chancery, jurisdiction. We are inclined to think such elements of discretion enter into this matter that we ought not to disturb the conclusion of the trial court upon it. But we think the law is already well settled in this state, as well as elsewhere, and, as before stated, that where the branches of a tree extend over an adjacent owner's land, he may lop them off up to the line, even though that were practically to the trunk of the tree. In this case a portion of the trunk is on the defendant's land, and the branch extension of 40 to 50 feet, as found, presumably reaches across it. That he should have less right to lop these branches because he owns a portion of the tree than if he owned none of it, appears to us to be unreasonable. The injunction should not extend further than to restrain the defendant from cutting any portion of the trunk and any further cutting of the branches or of the roots than he might lawfully have done had the trunk stood wholly upon the plaintiff's land, but reaching to the defendant's line. If in fact the trunk divides itself, as the tree extends upwards, into two or more parts, of similar size, with more of a perpendicular than horizontal extension, each of those parts should be regarded as a portion of the trunk.

In respect to the well, there was, we think, error in the action of the court, both in reference to the admission of evidence and in granting the injunction, whether the latter action be or be not regarded as influenced by such evidence. Concerning the testimony, the plaintiff seeks to justify its reception as being a declaration of the actual vendor at the time of the sale, and cites Norton v. Pettibone, 7 Conn. 323; Deming v. Carrington, 12 Conn. 5; Smith v. Martin, 17 Conn. 400; Ramsbottom v. Phelps, 18 Conn. 285. None of these cases, however, support his contention. For, waiving the point that the title to the premises now owned by the plaintiff was not at the time of such conversation in the declarant, William Waite, it is evident that the statement to the plaintiff "that the well went with the house, and would be sold to him," was not in its nature a declaration adverse to the declarant's title. It was not an assertion as to his title at all. There was no question then, nor is there now, that the declarant then had title to the land now belonging to the defendant on which the well is situated. It was therefore simply a statement of what interest or easement in land not to be conveyed "belonged to" and "would be sold" with the land to be conveyed. Whether, by the legal effect of the deed to the plaintiff, the well, or any right in it, was conveyed to him as an appurtenance or otherwise, is an inquiry to which the evidence under consideration is not relevant. If not so conveyed, whether the plaintiff has, or ever had before waiting so long, a cause of action for the reformation of the

instrument, so as to include the well as a part of the grant, is another and distinct question. In this case, however, to which William Waite is not a party, in which no claim for reformation is made, but only the title of the plaintiff as derived from the deed as it stands is counted upon, such inquiry cannot be entered into. Nor would any conceivable answer to it affect the decision of the point as to the admission, in this case, of the evidence now under consideration. There is no claim that the defendant had any notice of this conversation, and its use to impair the title of a bona fide purchaser, for full consideration, without notice, actual or constructive, of an adjoining piece of land, is clearly improper. The fact that the defendant derived his title from a quitclaim deed is entirely immaterial. "In this state a quitclaim deed is a primary conveyance, vesting in the releasee all the interest, even in fee, which the releasor has so conveyed. As a conveyance, it is of as much force as a warranty deed, differing from it chiefly in the superadded covenants, which may operate by way of estoppel upon a future-acquired interest, or may secure the covenantee against a bad or defective title." Sherwood v. Barlow, 19 Conn. 476. It might even be said that there is more reason why a releasee in a quitclaim deed should be protected from the operation of secret, unrecorded incumbrances on the property, where he purchased in good faith, and for full consideration, than such a purchaser whose title comes to him accompanied with covenants for his protection. But, further, in reference to the injunction, there was error. The plaintiff claims the record shows that the well, at the time of his purchase, was appurtenant to the dwelling house, and necessary thereto. We do not so understand the finding. At the time the dwelling was erected the well was dug, and connected with it by pipes. It was used as appurtenant to the house, either by pipes or by curb and bucket, up to and within a short time previous to the plaintiff's purchase. It was not so used at the time of the purchase. For the last five years of its actual use the curb and bucket had been employed. At the time of the purchase that also had been abandoned, and the well was covered by a flagstone. The pipes at that time connected the well with the house. Whether they do so still is not found. The plaintiff has never used the well. The defendant does not intend to destroy it, but the construction of his dwelling house would cover it. Why should he not so cover it, if he desired? It had already been covered when he bought, and it so remains. It is not found that the well has ever been, or ever is likely to be, necessary, or even useful, to the plaintiff. If it ever has been, why has he never used it? If he objects to its being covered, why did he receive his deed while it was in that condition? Why has he suffered it to remain so ever since? But he wishes, or he may, perhaps, wish hereafter, to revive the use of the pipe. It is entirely upon his own land, and reaches a well which the defendant has no intention to destroy. How, so far as the record discloses, will the proposed act of the defendant affect him in such use?

We come now to the question most extensively considered on both sides in the argument,—that in relation to light. The great practical importance of the subject presented will be our justification for a somewhat extended examination. By the common law, in England, the right to light and air over the land of another could be claimed in certain cases by prescription, and in certain others by implication, or what was called "implied grant." If the common law, as to the prescription, ever existed in Connecticut, it does so no longer. Gen. St. § 2970. But the plaintiff claims that the law as to implied grants of light and air does exist, and should be recognized in this state. That doctrine the plaintiff states as follows: "When a person, having erected a building upon a part of his land, and having placed therein windows opening upon the other part of his land, sells the building, with the land on which it stands, the right to the continual use and enjoyment of light and air through these windows passes to the grantee by implication." This asserted rule is a particular instance of the application of the doctrine of the creation of easements of various kinds,—the principal of which are perhaps ways and rights of passage by implication,—which doctrine is said to rest upon the application of the maxims: "A grantor cannot be allowed to derogate from his own grant," and "A grantor is presumed to convey, so far as it is in his possession, whatever is necessary for the reasonable enjoyment of the thing conveyed." Again, it is said to be based upon the supposed intention of the parties, as deduced from the surrounding circumstances; the essential element of which is the situation, relation, and condition of the granted and retained portions of the land. If we assume this doctrine, generally speaking, to be correct, the inquiry arises as to its proper limitations; and to what would be such in any given case, provided the question of its application arose between the grantee and his grantor, who still retained the other portion of the land, there must be added an additional consideration, provided, as in the present instance, such original grantor does not so retain, but has afterwards parted with, such remaining portion to another person, who is a bona fide purchaser for value. The policy upon which our registration laws as to conveyances of real estate is based, would seem to make it essential that, in order to claim such easement against such purchaser, it must be of a character so evidently necessary to the reasonable enjoyment of the

granted premises, so continuous in its nature, so plain, visible, and open, so manifest from the situation and relation of the two tracts, as to fairly and clearly indicate to a prospective purchaser of the reserved portion the intention of the parties to the previous sale that it should remain, and to make such purchaser chargeable with knowledge that the law, based on justice, that equity, founded on good conscience, would forbid him, in case of his purchase, so to occupy the lot as to interfere with such easement.

The general doctrine of easements by implied grants, and the ground upon which it is based, is well stated by this court in Collins v. Prentice, 15 Conn. 39, 43, in reference to private ways. In speaking of such ways, the court, by Waite, J., said: "It is well settled as a part of the common law of England that if a man having a close, to which he has no access except over his other lands, sell that close, the grantee shall have a way to it, as incident to the grant. * * * And although doubts have formerly been expressed upon the subject, it seems now to be as well settled that, if the grantor had reserved that close to himself, and sold his other lands, a right of way would have been reserved. * * * The way, in the one case, in contemplation of law, is granted by the deed, and, in the other case, reserved. And although it is called a way of necessity, yet in strictness the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties; for the law will not presume that it was the intention of the parties that one should convey land to the other in such manner that the grantee could derive no benefit from the conveyance, nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties. A way of this kind is limited by the necessity which creates it." These principles in reference to private ways—especially the limitation of such easements to cases of actual existing necessity—are further stated in Pierce v. Selleck, 18 Conn. 321; Seeley v. Bishop, 19 Conn. 128; Woodworth v. Raymond, 51 Conn. 70. In Massachusetts, in reference to such ways, it was said in Buss v. Dyer, 125 Mass. 291: "It is a well-established and familiar rule that deeds are to be construed as meaning what the language employed in them imports, and that extrinsic evidence may not be introduced to contradict or affect them. And it would seem that nothing could be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against incumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where, by a fiction of law, there is an implied reservation or grant to meet a special emergency on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation. This fiction has been extended to cases of easements of a different character, where the fact has been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed. In this commonwealth, grants by implication are limited to cases of strict necessity." Coming now directly to the subject of the application of this doctrine or "fiction" to light and air, it was said by Gould, J., in Ingraham v. Hutchinson, 2 Conn. 598, in speaking of what are called "ancient lights": "Besides, to what extent does this privilege or protection go, where it actually exists? Does the adjoining proprietor lose all right to erect a building upon his own land, whenever it would in the least degree diminish the light of a privileged window? Is he precluded from building at a distance of three rods, or one rod, or even at a less distance, from his neighbor's windows? I am not aware that the rule was ever claimed to extend so far. It goes no further, as I understand it, than to protect windows, which have been long used, from being obstructed, or, as it is often expressed in the books, 'stopped up.'" But the plaintiff claims that a much broader extension of the rule, in case of an implied grant, was distinctly recognized in this state in Bushnell v. Proprietors, 31 Conn. 150, a case upon which the plaintiff much relied. In that case it appeared that the plaintiff had formerly conveyed to the defendant, an ore-bed company, the right, in washing their ore upon a small stream that ran through his land, to discharge dirt upon his "meadow lot," lying below upon the stream. A great quantity of dirt accumulated on the meadow lot, filling the bed of the stream, and raising the lot above the adjoining land, so that the dirt washed upon the lot, spread, and was carried upon the plaintiff's pasture lot adjoining. The plaintiff had owned this lot at the time the deed was given. In holding that the defendant was not liable for any damage to the pasture lot resulting naturally from the discharge of dirt upon the meadow lot, this court (Dutton, J.) said: "A grantor is presumed to intend to convey, so far as it is in his possession, whatever is necessary to the reasonable enjoyment of the thing conveyed. It is well-settled law that if the owner of a lot conveys it to another person while there is upon it a dwelling house with windows opening upon another lot of the grantor, neither he nor his heirs nor assigns can erect a building upon the second lot so near as to exclude the light from the dwelling house." Now, it is evident, as the opinion itself states (page 157), that the question for discussion in Bushnell v. Proprietors was, what rights were in fact conveyed by the deed? This was a question solely of interpretation, in which the principles of the doctrine of implied grants, which do not, and have

never been claimed to, rest upon interpretation of language used, were in no sense involved. The entire discussion of the doctrine, as well as the illustration cited, was, therefore, wholly obiter. Nevertheless, both the principle and the illustration, although vouching as authority two cases, both of which have been distinctly overruled in almost every American jurisdiction where the question has since arisen, may, we think, fairly be adopted as a correct statement of the law, provided proper care is exercised in construing the terms used, bearing in mind that the presumption against the grantor that it was not his intention "to convey land in such manner that the grantee could derive no benefit from the conveyance" must be fairly weighed and applied with due regard to the counter presumption that it could not have been his intention "to so convey a portion as to deprive himself of the enjoyment of the remainder." From this consideration—manifestly just where the effort is to extend by pure implication the language used, and to thus supply what might so easily have been procured to be expressed, if it were intended—it will follow that the word "necessity" and the term "reasonable enjoyment" can have no fixed arbitrary and unyielding meaning, but must find their explanation in view of the situation of the parties, of the nature, character, and adaptability of the property, and in the light of surrounding circumstances. They should also receive a strict construction, for the reason that such implied easement is an impairment of "the exclusive dominion of every man over his own soil and freehold, now held sacred by our constitution and laws." Pierce v. Selleck, 18 Conn. 330. It may be true, as stated in Bushnell v. Proprietors, and the true ground of that decision, that "the construction of a deed, if it is doubtful, must be taken most strongly against the grantor." But in the case before us there is no question concerning the construction of language used, no claim that this is doubtful, but the imputation of language never used; and surely caution and moderation should be exercised in that.

It further must follow, we think, as a corollary from what has already been said, that the doctrine of easements by implied grant—a doubtful exercise of power by the courts in all cases—should, when applied to easements of light, be most cautiously used; and, briefly stated, that in the above quotation the words "exclude the light" should not be regarded as equivalent to "exclude any light"; in other words, that "exclude" is not to be held synonymous with "impair." To borrow the emphatic language of Dillon, C. J., in Morrison v. Marquardt, 24 Iowa, 64: "Surely, such an easement, uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates and laying an embargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy, —surely, such an easement should not be held to exist by mere implication, when such implication originates in no reasonable necessity." A careful examination of the cases in the United States upon the subject, both those cited in the very able and exhaustive brief in behalf of the plaintiff and others, justifies the statement that in what we have said we have been in harmony with the views held in the principal American jurisdictions. Wherever the doctrine of easements by implied grants of light and air has been recognized at all, it has been carefully restricted; and no well-considered case in this country, at least in recent years, can be found that has gone to the extent, in the application of such doctrine to the facts, to which it would be necessary to go in the present case in order to justify the judgment of the court below.

In Keats v. Hugo, 115 Mass. 204, which is a well-considered, and may be regarded as a leading, case, three actions were tried together. In the principal one the defendants conveyed to the plaintiff, by warranty deed in the usual form, a certain lot of land with a dwelling house thereon, situated on the line between the parties, created by said conveyence; the lot so conveyed being a part of a larger lot then, and the remainder of which was at the date of the action, owned by the defendants. The dwelling house had windows and a door in that part of the house adjoining the line. After said conveyance, the defendants placed a structure and woodshed on their own land, against said house, within about eight inches of the same. The question was "whether a person who sells a house overlooking land retained by him thereby deprives himself of the right to build on that land so as to obstruct the passage of light and air to the windows." The court (Gray, C. J.), in the opinion, said: "The question being of great practical importance to owners of real estate, and having heretofore been the subject of some variety and conflict of judicial opinion, we have thought this a suitable occasion to review the cases in this commonwealth, and to refer to the principal ones in other states." The court then proceeds to do this in an exhaustive manner, and concludes by saying: "By nature, light and air do not flow in definite channels, but are universally diffused. The supposed necessity of their passage in a particular line or direction to any lot of land is created not by the relative situation of that lot to the surrounding lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor, indeed, any use of them which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their exist-

ing condition. In short, the owner of adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot, therefore, be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned by one man than where the owners are different. The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case without express words would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed. In accordance with these views, the English doctrine of implied grants of rights of light and air has been wholly rejected in several well-considered cases. Palmer v. Wetmore, 2 Sandf. 316; Myers v. Gemmel, 10 Barb. 537; Haverstick v. Sipe, 33 Pa. St. 368; Mullen v. Stricker, 19 Ohio St. 135; Morrison v. Marquardt, 24 Iowa, 35. And with the single exception of Janes v. Jenkins, 34 Md. 1, all the opinions of American judges with which the learning and research of counsel have supplied us, in favor of the acquirement of such a right by mere implication from the conveyance of a house, have been either, as in Lampman v. Milks, 21 N. Y. 505, 512, obiter dicta, or, as in Robeson v. Pittenger, 2 N. J. Eq. 57, in those states in which a like right is held to exist by prescription, and therefore of no weight as authority in this commonwealth. Considering, therefore, that by the preponderance of reason and of authority no grant of any right of light or air over adjoining lands is to be implied from the conveyance of a house, we have only to apply this rule to the facts of the cases pending before us." Judgment was ordered for the defendants.

The case of Keats v. Hugo has been quoted with approval, and recognized as authority in other states. Doyle v. Lord, 64 N. Y. 432, was a case where the facts were that the plaintiffs leased the first floor of a building in the city of New York for a store. In the rear was a yard attached to and exclusively appropriated for the use of the building, to which all the occupants had access through a hall running from the front to the rear of the building, and, as the building was occupied when the plaintiff leased, no tenant could dispense with it. The rear of the store received light necessary for the transaction of business therein from windows opening into the yard. In holding that the lessor could, upon the facts found, be restrained from building in the yard so as to obstruct the light, the court (Earl, J.) said: "This conclusion is reached without any departure from what may be called the American doctrine as to light and air, as distinguished from the English common-law doctrine, and the law as laid down in the following authorities is fully recognized: Parker v. Foote, 19 Wend. 315; Palmer v. Wetmore, 2 Sandf. 316; Myers v. Gemmel, 10 Barb. 537; Mullen v. Stricker, 19 Ohio St. 135; * * * Haverstick v. Sipe, 33 Pa. St. 368; Keats v. Hugo, 115 Mass. 204. * * * Under these authorities, if the lessor had sold the store and lot upon which it stood, twenty-five feet by fifty-one, the grantee would have taken no right to light and air from the balance of the lot. In that case the grantor could have built upon the balance of the lot, and thus have darkened the windows in the store without violating any rights of the grantee. In this case, if the yard had not been part of the lot upon which the building was standing, and if it had not been appropriated to use with the building so as to pass as appurtenant thereto so far as to give easements therein to the tenants of the building, the plaintiffs could not have complained of the acts of the defendants alleged in the complaint."

In Turner v. Thompson, 58 Ga. 268, an executrix sold a half lot of land, with a tenement thereon, opening upon the other half lot; and bought the other half herself at the same sale. It was held that she "will be estopped from obstructing the passage of light and air through such windows, if those windows were necessary to the admission of sufficient light and air for the reasonable enjoyment of the tenement which she sold; aliter, if sufficient light and air can be derived from other windows opened, or which could conveniently be opened, elsewhere in the tenement, to make the rooms reasonably useful and enjoyable." The court (Jackson, J.) cites with approval Keats v. Hugo, supra; adding: "The principle applied by the supreme court of West Virginia in a recent case there seems to us sound and sensible, and we shall adopt it in this case. * * * That principle is that 'an implied grant of an easement of light will be sustained only in cases of real necessity, and will be denied or rejected in cases when it appears that the owner claiming the easement can, at a reasonable cost, have or substitute other lights to his building.'" The court adds: "We apply this principle the more readily because it appears to be the conclusion of Washburn (Easem. p. 618), drawn from a consideration of all the English and American authorities, and because, as before stated, it strikes us as reasonable and right. * * * So Tyler approved the same principle (Tyler, Bound. 550), and Judge Story is authority to the same point (U. S. v. Appleton, 1 Sumn. 492–502, Fed. Cas. No. 14,463)." In this case the injunction granted was dissolved, because

the "decree, as it stands, might be held to enjoin her from building, if these lights were at all impaired; and we think such action ought not to be had except in case of necessity as before explained."

In Rennyson's Appeal, 94 Pa. St. 147, 152, both Keats v. Hugo and Turner v. Thompson are cited and approved, the opinion saying of the latter: "It is worthy of remark, however, that this case limits the general application of Keats v. Hugo as between dominant and servient tenement in one important respect. I think the limitation is wise and right. It is that an implied easement of light and air will be sustained in case of real necessity." The opinion then proceeds to lay down the following rules: "(1) No implication of a grant of the right to light and air arises upon a sale of one of two adjacent lots having a house upon it, with windows overlooking the land of the grantor. (2) The grantor, by such sale, is not estopped from improving his retained lot by building upon it, though his erection darkens the windows of his vendee, and excludes the access of light and air from such windows. (3) That the limitation of these two propositions depends upon the fact as to whether such windows are a real necessity for the enjoyment of the grantee's property. If they be, then the implication of the grant of an easement of light and air will be sustained; if they be not, or can be substituted at a reasonable cost, with a view to the purposes of the dominant tenement, then such implication will be denied and rejected. (4) The American doctrine as to light and air requires an express grant or agreement, unless a real and actual necessity exists, to vest a dominant tenement with such light. (5) The doctrine of ancient lights is not recognized."

A somewhat earlier case than those just cited is that of Morrison v. Marquardt, 24 Iowa, 35, to which reference has already been made, and in which a very elaborate opinion was written by Dillon, C. J., and strong ground is taken against the implication of an easement of light and air, except in cases of strictest necessity. See, also, Sutphen v. Therkelson, 38 N. J. Eq. 318; White v. Bradley, 66 Me. 254; Brande v. Grace, 154 Mass. 210, 212, 31 N. E. 633,—where, in case of a plaintiff lessee, held entitled to a remedy, the court said: "We do not regard this view of the rights of the parties as at all inconsistent with the decision in Keats v. Hugo, 115 Mass. 204, and other cases, which hold or intimate that the necessity must be pretty plain in order to warrant the implication of a grant." See, also, Case v. Minot, 158 Mass. 577, 33 N. E. 700,—a case similar to Doyle v. Lord, supra, to which it refers.

Applying these principles to the case before us, what result is fairly reached? Here was a lot located on Bradley street, about six blocks from the center of the city of New Haven, with a frontage of 61 feet, and a depth of 98 feet. A dwelling house stood upon the westerly part of said lot. The plaintiff purchased said westerly part, 40 feet frontage, with said dwelling house thereon. That left the grantor a lot 21 feet front, which shortly afterwards was sold to the defendant. If we are to go into the business of raising presumptions,—as we must, to support implied grants,—it is fair to suppose the plaintiff did not pay the price and value of the 61-foot lot, for his 40-foot lot. But it would have been just for him to have done so, provided he intended to avail himself of the only beneficial use of it,—keeping it open and unoccupied, in order to have no obstruction to the light of his sitting and dressing room derived from his bay window. It is also fair to presume that his grantor would not have sold a portion for a less price than the whole, provided the remainder was thereby to become practically useless to him; and, if he had charged the price of the whole for a portion, would not the plaintiff have insisted upon taking the whole instead of a portion only? But the grantor would not have sold a portion only, unless the part retained was beneficial to him. But in what could any substantial benefit from such a lot consist unless it could be built upon? And if building was contemplated, there could be little question, apparently, in view of the narrowness of the lot, that such building would require to extend substantially to both sides of the ground. The fact that the plaintiff purchased land extending 5 feet beyond the east face of his bay windows, and from 10 to 11 beyond that of his house, is significant. Such additional width of 5 feet would evidently have been useful to a 21-foot lot. But the plaintiff purchased it, thereby giving himself in fact, whatever his purpose may have been, a strip of that width, upon which no structure could be constructed without his act, to either exclude or impair his light. When the defendant, who lived near, and was fully acquainted with the property, bought, what was the evident situation? He found a narrow, vacant lot, adapted to the purposes of building; presumably to no other use. The plaintiff's house, itself upon a lot so narrow that it extended nearer to the opposite side of the lot than to the side in question, on which there were five feet clear beyond the uttermost extension in a bay window, which projected five or six feet from the side of the house. Could any one purchasing property under such circumstances have supposed that it was the intention of the parties, in making and accepting the grant of the portion of the original premises which had been conveyed to the plaintiff, that there should go with such premises, by implication—by implied grant—a right in the remaining portion of such premises, paramount to and preventative of their beneficial use and enjoyment? We think not. Should the defendant, then, have been enjoined from the acts proposed? His intention was to build a dwelling house to extend down along the boundary line, for a distance of 58 feet from a point about 6

feet from Bradley street, the wall of which was to be about 20 feet high. It is found by the court that "the erection of said dwelling house would deprive the plaintiff of the supply of light which has come across said 21 feet, now owned by the defendant, and would make it necessary for the defendant to light his sitting room and dressing room with gas or some other light in the daytime, in order to obtain sufficient light for the reasonable use of the rooms." This is a finding of fact which we are not at liberty to review. But we have the right, and it is our clear duty, to interpret the language, so far as the same, by reason of indefiniteness, requires interpretation, by the aid of those facts which pertain to that common and general fund of knowledge and information which belongs to the domain of things of which all courts are bound to take judicial notice. By this assistance it becomes evident that the depreciation of light which would ensue from the intended act of the defendant is far from total. The plaintiff would not only be left with so much light as would come from the unobstructed space between the buildings, including the additional space covered by the northeastern and southeastern sides of his bay window, to which he could add by putting in windows elsewhere, or differently constructed; he would also have the light from overhead, beyond the top of a wall 20 feet high; and as to his dressing room on the second story of his house, which does not extend so far eastward into several feet as the sitting room bay window projection, the angle in which the light would be admitted would seem to be such as to make the obstruction comparatively small. It seems to us, therefore, that the proposed act of the defendant would be, in view of all the circumstances, an interruption of light to the plaintiff to the extent of that which is convenient only, not to that which is necessary for the reasonable enjoyment of his dwelling. Indeed, that enjoyment is not reasonable which deprives the defendant of any use of his property, in order merely that the plaintiff may, by reason of such deprivation, have a more comfortable, convenient, and better use of his own. In view of the facts found, as we interpret the finding, we conclude that an injunction could not have been granted had not the trial court adopted what we hold to be the wrong standard, substituting convenience for necessity as the test by which to determine the existence of the right claimed. In this respect also the court erred.

The court also erred in granting an injunction in so indefinite terms. It is impossible to lay down any precise rule of universal application upon the subject. But the person enjoined is entitled to know with reasonable certainty what acts he may and may not do without making himself liable as in contempt of an order. In reference to light, it was the claim of the defendant throughout—a claim which we are not at liberty to say was not made in good faith—that the erection intended to be made by him would not be of such a character or "so near as to exclude the light from the plaintiff's dwelling house." This claim the court overruled. But there is nothing in the injunction to indicate whether any erection, or, if so, how near, or of what a character, would be permissible. Without endeavoring to state what degree of certainty would have been reasonably practicable under the circumstances, which is unnecessary in view of what we have held upon the other questions in the case, it is sufficient to say that it seems to us the language employed falls short of the degree of definiteness which could without inconvenience be attained, and should be required. There is error, and a new trial is granted. The other judges concurred.

BRACKETT v. GODDARD.

(54 Me. 309.)

Supreme Judicial Court of Maine. 1867.

D. D. Stewart, for plaintiff. A. W. Paine, for defendant.

APPLETON, C. J. This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property and may be seized and sold on execution. Staples v. Emery, 7 Greenl. 301. So, wheat or corn is a growing chattel and may be sold on execution. Whipple v. Tool, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed (2 Kent, Comm. 346), or by statute, as in this state by Rev. St. c. 81, § 6, cl. 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. Goodrich v. Jones, 2 Hill, 142. Hop poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop raising, are part of the real estate. Bishop v. Bishop, 11 N. Y. 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks Richardson, C. J., in Kittredge v. Wood, 3 N. H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation."

The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the statute of 1867 (chapter 88), defining the ownership of down timber. It would have been otherwise, had they been cut into logs or hewed into timber. Cook v. Whitney, 16 Ill. 481.

The defendant, at the plaintiff's request, travelled from another state, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by statute.

Offset allowed. Defendant defaulted, to be heard in damages.

CUTTING, KENT, WALTON, DICKERSON, and BARROWS, JJ., concurred. TAPLEY, J., dissented.

GRAVES v. WELD.

(5 Barn. & Adol. 105.)

Court of King's Bench. 1833.

Mr. Follett, for plaintiff. Mr. Gambier, for defendant.

DENMAN, C. J. In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description? We think it does not.

In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant all the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest. The defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced, within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law.

It is not, however, absolutely necessary to decide this question; for, assuming that the plaintiff's rule is the correct one, the crop which is claimed was not the crop growing at the end of the term. The last cestui que vie died in July. The barley and the clover were then growing together on the same land, and a crop of both, together, was taken by the plaintiff in the autumn of that year; though the crop of clover of itself was of little value. Thus the plaintiff has had one crop. And if it were necessary, either generally, or in the particular case, that the crop taken should remunerate the tenant, we must observe, that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground; but as the more general and important question has been most fully and elaborately argued, we think it right to say we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends are Littleton (section 68), and Coke's commentary on that passage. The former is as follows: "If the lessee soweth the land, and the lessor, after it is sowne, and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry, egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him." Lord Coke (Co. Litt. 55a), says: "The reason of this is, for that the estate of the lessee is uncertaine, and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe, or flax, or any other annuall profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees, or young oaks, ashes, elmes, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yield no present annuall profit." These authorities are strongly in favour of the rule contended for by the defendant's counsel. They confine the right to things yielding present annual profit, and to that year's crop which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within the rule. In Latham v. Atwood, Cro. Car. 515, they were held to be "like emblements," because they were "such things as grow by the manurance and industry of the owner, by the making of hills and setting poles." That labour and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables. Mr. Cruise, in his Digest (volume 1 [3d Ed.] 110), says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements; it by no means proves, that the person who planted the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to show that things which take more than a year to arrive at maturity, are capable of being emblements, except the case of Kingsbury v. Collins, 4 Bing. 202, in which teazles were held by the court of common pleas to be so. But this point was not argued, and the court does not appear to have been made acquainted with the nature of that crop or its mode of cultivation, or it may be, that in the year when the plant is fit to gather, so much labour and expense is incurred, as to put it on the same footing as hops. We do not therefore consider this case as an authority upon the point in question.

The note of Serjeant Hill in 9 Vin. Abr. 368, in Lincoln's Inn Library, which Mr. Gam-

bier quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because there the estate of the tenant is supposed to determine after harvest, whereas here it determined before.

The weight of authority, therefore, is in favour of the rule insisted upon by the defendant. There are besides some inconveniences, doubts, and disputes, which were pointed out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in autumn, besides the crop in the following year? If so, he gets something more than one crop. Is he to have the possession of the land for the purpose? Or is the reversioner to have the feeding; and, in that case, is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant's rule is adopted. It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at the most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.

We are therefore of opinion that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment. Judgment for the defendant.

BRADLEY v. BAILEY et al.

(15 Atl. 746, 56 Conn. 374.)

Supreme Court of Errors of Connecticut. Jan. 13, 1888.

Appeal from court of common pleas, New Haven county; Deming, Judge.

Trespass by James H. Bradley against George R. and Abraham L. Bailey for entering upon land occupied by plaintiff, and destroying a crop of rye growing thereon. Plaintiff recovered judgment in the court of common pleas, and defendants appealed.

L. Harrison and E. Zacher, for appellants. E. P. Arvine and G. A. Tyler, for appellee.

BEARDSLEY, J. This is a complaint in trespass, in which the defendants appeal from an adverse judgment in the court of common pleas. The material allegations of the complaint are that one John R. Bradley was tenant for life of a certain tract of land, of which the defendant George R. Bailey was tenant for life in remainder; that John B. Bailey, in the month of April, 1885, leased the tract to the plaintiff for the term of three years; that the plaintiff sowed a portion of the tract with winter rye on the 18th of September, 1885; and that John B. Bailey died on the 20th of September, 1885, and that George R. Bailey, and the other defendant, by his direction, in the month of June following, plowed in and destroyed the crop of rye then maturing. The truth of these allegations of the complaint was admitted upon the trial, except that the defendant claimed that the rye was sown on the 19th instead of the 18th day of September, 1885; which, however, is immaterial. The only question which we are called upon to consider arose under the issue formed by the plaintiff's traverse of the second answer to the complaint, the material part of which is as follows: The defendants say that if the plaintiff did anything upon said premises on September 18th or 19th, 1885, he did the same with full knowledge that said John B. Bailey was then dying; that if he did anything it was nothing more than to harrow the soil in a hasty and superficial manner immediately after he had dug his crop of potatoes from the same, and to scatter a few seeds upon the same, without having first plowed and manured the same, as is customary and proper with the farmers in this state, and at an untimely season of the year, and without laying the same down to grass, as is customary and proper,—all of said acts of the plaintiff being for the purpose of defrauding said George R. Bailey in his use of and right to said land after the death of said John B. Bailey." Upon the trial of this case to the jury the plaintiff, in reply to inquiries made by the defendants upon cross-examination, described the manner in which he prepared the ground for the crop. The defendant afterwards asked his own witness this question: "What is the customary way of sowing rye, and preparing the ground for it?" The court excluded this question, upon the objection of the plaintiff that there was no established custom, and that it was immaterial. The defendants claimed the testimony to show that the land was not prepared in the customary way as a part of the alleged defense. This ruling of the court is assigned for error. In support of the allegation in the answer that the plaintiff knew that Bradley, the tenant for life, was dying when he sowed the crop, the defendants called Dr. Webb, the physician who attended him during the month of September, 1885, and who, after describing his symptoms, testified that for the last week or more of his life he was gradually failing every day, growing weaker and nearer to his end every day, and that this was apparent to every one who had common sense. It was admitted that at the time of his death, and for several months before, he resided with the plaintiff. The defendants then offered several witnesses to testify,—one, that Bradley appeared to be dying on the 16th and 17th of September, when the plaintiff was present; another, that the plaintiff's attention was called by him to Bradley's condition on the 18th of September, 1885; another, that the plaintiff had said on the 18th and 19th of September that Bradley could not live through the night; and another, that the plaintiff had said, a few days before Bradley's death, that he was very low. All of this evidence, except the testimony of Dr. Webb, was objected to by the plaintiff, and excluded. The plaintiff, against the objection of the defendants, was permitted to testify, in contradiction of Dr. Webb, that the doctor had told him, as late as the last week of Bailey's life, that "he might live for quite a long time; that he might get out of it, and live for a year or two, and perhaps longer, and might not live so long as that." The court charged the jury on this point as follows: "The question, then, is, did the plaintiff know for a certainty that his lessor, the tenant for life of the estate, would die before he could mature that crop? If we find that there was any uncertainty in regard to the duration of the life of Mr. Bailey, you must find for the plaintiff. If you find that the time of his death was so certain that he (Bradley) had no doubt in regard to it, then your verdict should be for the defendants."

The several rulings of the court, and the charge to the jury referred to, are assigned for error. We do not think that either of them afford the defendants any ground of exception. On the contrary, we think that the charge was too favorable to the claim of the defendants. It was adapted to the issue between the parties, and would perhaps have been unobjectionable if that issue had been a material one; but the isssue was an immaterial one, and the plaintiff would have been entitled to judgment upon the conceded facts if it had been found in favor of the defendants. If it were possible for the plaintiff to have had absolute knowledge beforehand of the time of Mr. Bailey's death, and he had known that it would occur before

the maturity of the crop which he was planting, his right to it would not be thereby defeated. In Co. Litt. 55b, note 1, the law is thus stated: "So, therefore, if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God; and the same law is of the lessee for years of the tenant for life." Blackstone says, (2 Comm. 122:) "Therefore if a tenant for his own life sows the land, and dies before harvest, his executors shall have the emblements or profits of the crop; for the estate was determined by the act of God, and it is a maxim of the law that actus Dei nemini facit injuriam." We are referred to no case in which the exception claimed by the defendants has been made to this rule during the centuries of its existence. To hold that this right may be defeated after the tenant's death, by evidence of his condition of health, or by his declarations or those of his lessee imputing a belief, however well founded, or knowledge, if such knowledge be possible, that his life would not continue until harvest time, would in many cases subvert an important object of the rule,—the encouragement of husbandry,—and open a fruitful source of unseemly litigation. A tenant in failing health, especially if he had expressed a belief that his end was near, would naturally hesitate to put in crops which might be successfully claimed by his successor in title, or in respect to which his estate might become involved in litigation. The question asked by the defendants of a witness as to the customary mode of sowing rye, and preparing the ground for it, was properly excluded. We have shown that the plaintiff had a right to sow the rye for his own use, and it was a matter of no consequence to the remainder-man how he did it. Nor did his right to the crop depend upon his cultivating the land according to the rules of good husbandry. If it was done in an unhusband like manner, and in such a way that the crop would be an inconsiderable one, it would be wholly his own loss. The fact of his hurried and imperfect mode of sowing the land may have been of pertinence to the question whether he was in reality sowing rye, or only pretending to do so. But it was not offered for this purpose, but to show that he was acting in the belief that the tenant for life would die in a few days. But, as we have already shown, this belief was of no importance. His right did not depend upon the condition of the tenant for life. And he would have no interest in putting any labor on the land as a matter of mere pretence, as he would only lose his labor by so doing. There is no error in the judgment appealed from. The other judges concurred.

WALKER v. SHERMAN.

(20 Wend. 636.)

Supreme Court of New York. Oct., 1839.

L. Walker and B. D. Noxon, for plaintiff. C. P. Kirkland, for defendant.

COWEN, J. Judging from the affidavits before us, the machinery which the commissioners excluded as being personal property, was such only as was movable, and in no way physically attached to the factory or land, though it had been used for several years, as belonging to the factory, and was as material to its performance in certain departments of its work, as the machinery which was actually affixed. Did the commissioners err in disregarding the movable machines? That is the only question. If they were right, the equality and justice of the partition are apparent upon the proofs; if wrong, the report should be set aside, and the commissioners be required to review their decision.

The question is one between tenants in common, the owners of the fee; and is, we think, to be decided on the same principle as if it had arisen between grantor and grantee, or as if partition had been effected by the parties through mutual deeds of bargain and sale. As between such parties, the doctrine of fixtures making a part of the freehold, and passing with it, is more extensively applied than between any others. As between tenant for life or years and reversioner or remainder man, all erections by the former for the purposes of trade or manufactures, though fixed to the freehold, are considered as his personal property, and as such, may be removed by him during his term, or be made available to his creditors on a fieri facias. On his death, they go to his executors or administrators; yet by a conveyance, they pass to the vendee. Fructus industriales, it is well known, always go, on the owner's death, to the executor or administrator, not to the heir; whereas, they are carried by a devise or other conveyance of the land, to the devisee or vendee. Spencer's Case, Winch, 51; Austin v. Sawyer, 9 Cow. 39; Wilkins v. Vashbinder, 7 Watts, 378, and the cases there cited overruling Smith v. Johnston, 1 Pen. & W. 471, contra. The general rule is, that anything of a personal nature, not fixed to the freehold, cannot be considered as an incident to the land, even as between vendor and vendee. The English cases on this subject are, most of them, well collected and arranged in Amos & F. Fixt. p. 1, c. 1; Id. (Am. Ed. 1830) p. 180, c. 5. For some still later, see Gib. Fixt. p. 15, c. 2. The American cases are mostly collected in 2 Kent, Comm. (3d Ed.) 345, note c. I have said that as a general rule, they cannot be considered an incident unless they are affixed. This is not universally so. A temporary disannexing and removal, as of a millstone to be picked, or an anvil to be repaired, will not take away its character as a part of the freehold. Locks and keys are also considered as constructively annexed; and in this country it must be so with many other things which are essential to the use of the premises. Our ordinary farm fences of rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about a farm. I shall hereafter have occasion to notice these and a few other like instances of constructive fixtures. I admit that some of the cases are quite too strict against the purchaser; but as far as I have looked into them, and I have examined a good many, both English and American, they are almost uniformly hostile to the idea of mere loose movable machinery, even where it is the main agent or principal thing in prosecuting the business to which a freehold property is adapted, being considered as a part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must be attached to it in some way; at least, it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself.

The question has been occasionally examined in this court as between grantor and grantee, and in some other relations. The most material cases are Heermance v. Vernoy, 6 Johns. 5; Cresson v. Stout, 17 Johns. 116, 121; Miller v. Plumb, 6 Cow. 665; Austin v. Sawyer, 9 Cow. 39; and Raymond v. White, 7 Cow. 319. None of them treat a personal thing as a fixture short of physical annexation; and some are peculiarly strong against the purchaser. The first related to a sale of land, on which was a bark-mill, and a stone for grinding bark, to be used in a tannery. The court said, it seems to be the better opinion that the mill was personal property: for the millstone, with the building covering it, was accessory to the tanning business, a matter of a personal nature. Taken upon that reason, a saw-mill or grist-mill would hardly have passed by such a conveyance; yet it has been settled ever since the Year Book 14 Hen. VIII. p. 25, that the stones of a grist-mill are a part of the freehold, though removed for the purpose of being picked; and they shall pass by a sale of the land. Amos & F. Fixt. p. 183. In Cresson v. Stout, Mr. Justice Platt expressed his opinion, that frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor, and cleats nailed to the floor round the feet, neither of the machines being nailed to the building, would not be considered as a part of the freehold. He thought, therefore, that they might be levied on as personal property, under a fi. fa. against the owner. But the question was not finally decided. Had the judgment debtor been a mere tenant for life or years, the machinery erected by him would doubtless have been subject to execution against him. But he appears to have owned the fee, subject to a mortgage.

In the case of Swift v. Thompson, 9 Conn. 63, the dictum of Platt, J., was followed with respect to cotton machinery, the posts of which were fastened to the floor by wooden screws set

into the floor. By unscrewing, the machinery could be removed without injury to the building. Dagget, J., said: "We resort, then, to the criterion established by the common law: could this property be removed without injury to the freehold? The case finds this fact. This, then, should satisfy us." The views of the learned judge are sustained by the strong case of Gale v. Ward, 14 Mass. 352. There, the owner of the freehold had carding machines in his woollen factory, "not nailed to the floor, nor in any manner attached or annexed to the building, unless it was by the leather band which passed over the wheel or pulley, as it is called, to give motion to the machines. This band might be slipped off the pulley by hand, and it was taken off, and the machines removed from time to time, when they were repaired. Each machine was so heavy as to require four men to move it on the floor, and was too large to be taken out at the door. But it was so constructed as to be easily unscrewed and taken in pieces; and the machines were so taken in pieces, when removed by the deputy sheriff." He had levied upon them as being the personal property of the freeholder, entirely distinct from the realty. Parker, C. J., said: "They must be considered as personal property, because although in some sense attached to the freehold, yet they could easily be disconnected, and were capable of being used in any other building erected for similar purposes. It is true, that the relaxation of the ancient doctrine respecting fixtures has been in favor of tenants against landlords; but the principle is correct in every point of view." But see Bank v. Emerson, 15 Mass. 159, and Whiting v. Brastow, 4 Pick. 310. Gale v. Ward is questioned by Richardson, C. J., in Kettredge v. Woods, 3 N. H. 506. Some of the doctrine in McLintock v. Graham, 3 McCord, 553, was equally strong with that in Gale v. Ward. A still was fixed in a rock furnace, which furnace was built inside and against the wall of a house that had been erected for the express purpose of a still. The whole stood on a tract of land sold under a fi. fa. against the owner, and the court said the still did not pass. But there was evidence of the still being excepted at the sheriff's sale, and sold to another; so that the question did not rest entirely on annexation. Besides, as to this point, the case was afterwards shaken by Fairis v. Walker, 1 Bailey, 540, which I shall presently notice more at large. Hutchinson, C. J., in Wetherbee v. Foster, 5 Vt. 142, denied that potash kettles set in brick arches, with chimneys, are real estate. But he cited no authority. The case of Duck v. Braddylb, 1 McClel. 217, 13 Price, 455, treats cotton machinery, placed and fastened for the purposes of stability, by a tenant for years in a manufactory, as subject to be distrained by his landlord for rent, and to be taken in execution against him. This, doubtless, was so under the peculiar circumstances of that case. Mr. Gibbons remarks, upon this case (Gib. Fixt. 20) that such machinery would seem not to be a fixture, if fastened by bolts or screws, and capable of being removed and replaced without injury, either to the machinery or the building. But the question, whether it should be deemed a fixture as between the owner of the freehold and his devisee or grantee, could not arise; and, according to the report in Price, the court expressly refused to pass on the question of fixture; according to McClelland, they silently omitted to notice the point.

The third case which I noticed as decided in this court was Miller v. Plumb. This regarded an ashery; and the court recognized and acted on the general distinction, that things in any way fixed to the freehold, e. g., potash kettles set in an arch of mason work with a chimney, though the arches were placed on a platform and not fastened to the building, would pass by a sale of the premises; but it was held, that small kettles, not fixed in any way, though necessary for use in the ashery, would not pass. The distinction between the relation of vendor and vendee, tenant and landlord, was distinctly considered and recognized. See, also, Reynolds v. Shuler, 5 Cow. 323. The same distinction was held by Savage, C. J., in Raymond v. White. The question there was in respect to a heater used in a tannery, but in no way attached to the building. It was placed in a leach or vat, which latter was detached from the building, except that a small piece of board was tacked with nails to the vat and to the side of the building. But there was no necessity for fastening the vat, and the fastening was of no use except to keep the side standing while the vat was put together. The question was really one between landlord and tenant. But Savage, C. J., said the heater could not be considered as part of the realty, even if the person who placed it had owned the tannery. 7 Cow. 321. In Kirwan v. Latour, 1 Har. & J. 289, the sheriff had sold, under a fi. fa. against the owner, a house and lot with the appurtenances. This house was built for a distillery; and the implements necessary to carry on the business were on the premises at the time of the sale. In trover by the owner for these, the court held that the pumps, cisterns, iron grating, door, distillery, and horse mills, passed by the sheriff's deed, but not the joists, vats, buckets, pickets, and faucets. The case went on the distinction between things affixed to the freehold and the mere loose utensils necessary for carrying on the business. The former were held to pass, though Chase, J., conceded that a tenant erecting them might have taken them away. It being as he said the same as a question between ordinary vendor and vendee, "everything passed which was annexed to the freehold." Id. 291. The same thing was said as to the fixtures in an iron foundry. Hare v. Horton, 5 Barn. & Adol. 715. Park, J., said: "Prima facie, a mere conveyance of the foundry would have passed them." Taunton, J., said, if the deed had only mentioned the foundry, the fixtures would have passed. "There are many cases which show this." Patterson, J., said: "I should be sorry to bring into question the decision of this court, that a

conveyance of premises will pass all that is attached to them." And Bank v. Emerson, 15 Mass. 159, narrows the general reasons of Gale v. Ward. It holds that a kettle fixed in brick-work in a fulling-mill, passed to the mortgagee of land, on which the fulling-mill stood, though the appurtenances were not mentioned. The court recognized the usual distinction in favor of tenants. So they did in Whiting v. Brastow, 4 Pick. 310. In Fairis v. Walker, 1 Bailey, 540, the plaintiff sold and conveyed his plantation to the defendant. On this, cotton was grown; and a cotton gin was in a gin-house on the premises attached to the gears. The plaintiff brought trover for the gin; but the court were of opinion that it was a fixture, and passed with the freehold. They said that, as between heir and executor, or vendor and vendee, "all things which are necessary to the full and free enjoyment of the freehold, and are in any way attached to it, are held to be fixtures, and pass with it." In the Case of Olympic Theatre, 2 Browne, 279, 285, the court said: "The permanent stage is so fixed to the freehold that it ought to be considered as a part of it. But the movable scenery and flying stages are not necessary accessaries to the enjoyment of the inheritance. They were only necessary for the purposes of theatrical exhibitions, which in this respect must be considered as a species of trade. We are, therefore, of opinion, that they do not belong to the inheritance, and consequently, are not subject to the liens, particularly when conflicting with the claims of execution creditors." The court recognized the distinction in favor of tenants; but they appear to consider the rule as also very strict against the heir when the question arises between him and the executor, which has been said to be the same in respect to fixtures as between vendor and vendee. Spencer, C. J., in Holmes v. Tremper, 20 Johns. 30. Miller v. Plumb, 6 Cow. 665. In the Case of Olympic Theatre, the court say (2 Browne, 285): "The general rule appears to be, that where the instrument or utensil is an accessary to anything of a personal nature, as to the carrying on a trade, it is to be considered a chattel; but where it is a necessary accessary to the enjoyment of the inheritance, it is to be considered as a part of the inheritance; a rule as broad as that stated in Heermance v. Vernoy, and which has since been utterly repudiated by the Pennsylvania cases. In Gray v. Holdship, 17 Serg. & R. 413, a copper kettle or boiler in a brew-house was held to be a part of the freehold, though very slightly attached; and the court mention the wheels, stones, and bolting-cloths of a mill as parallel and familiar instances. Id. 415. So the engine by which a steam saw-mill is propelled, thus performing the usual office of a water-wheel. The court mentioned the gears of a mill as part of the freehold. Morgan v. Arthurs, 3 Watts, 140, and see Lemar v. Miles, 4 Watts, 330, S. P. admitted. So a steam engine, with all its fixtures, used to drive a bark-mill in a tannery, being erected by the owner of the freehold, was held to pass by a sale of the latter. Ives v. Ogelsby, 7 Watts, 106. In Massachusetts, two stoves fixed to the brick-work of a chimney were held to pass. Goddard v. Chase, 7 Mass. 432. In Gib. Fixt. 17, the learned author remarks that: "In Horn v. Baker, 9 East, 215, it was not doubted but the distillers' vats, supported upon brick-work and timber, but not let into the ground, and vats standing on horses or frames of wood, were goods and chattels; and that stills set in brick-work, and let into the ground, were fixtures." He adds that a copper merely resting on a brick-work socket, and a water-butt standing on the ground or a wooden stool, are not fixtures. Otherwise if the copper were fastened in brick-work.

A deed conveying a saw-mill was held to pass a mill-chain, dogs and bars, they being in their appropriate places at the time. Farrar v. Stackpole, 6 Greenl. 154. The great difficulty arose as to the chain. This was attached by a hook to a piece of a draft-chain, which was fastened to the shaft by a spike. The chain was prepared for being hooked and unhooked at pleasure. The premises in question were here conveyed as a saw-mill eo nomine. The chain was commonly used in drawing logs into the mill. The court, therefore, thought that it might pass as being essential to the mill, and therefore included in the terms of the conveyance. But, they added, "we are also of opinion, that it ought to be regarded as appertaining to and constituting a part of the realty." See, in connection with this, the remarks of Hart, Vice Ch., near the close of his opinion in Lushington v. Sewell, 1 Sim. 435, as to what will pass by the devise of West India land by the name of a plantation.

Certain things are fixtures or not, in their own nature, independent of the fact of annexation. Accordingly, some things which are entirely detached from the freehold are, notwithstanding, holden constructively to belong to and pass with it. Such cases arise where the fixture is detached for some temporary purpose. We before noticed the removal of a millstone to be picked as one instance. Amos & F. Fixt. 183. So, where the stones and irons of a grist-mill were accidentally detached by a flood carrying away the main body of the mill, they were still holden to continue a part of the realty, and therefore not to be seizable on fi. fa. at the suit of a creditor, as personal property. Goddard v. Bolster, 6 Greenl. 427. On the other hand, articles of furniture movable in their nature are not fixtures, though attached by screws, nails, brackets, &c. Such are hangings, pier-glasses, chimney-glasses, book-cases, carpets, blinds, curtains, &c. Gib. Fixt. 20, 21.

Whatever its use or object, however, unless the thing were physically annexed to the freehold in some way, it has in general been held not to pass even as between vendor and vendee. This was held of a stove standing on the floor during winter, the funnel running into the chimney, but being loose and not plastered in. The stove was up at the time of the conveyance. Williams v. Bailey, 3 Dane, Abr. 152. So of a padlock, and

loose boards used for putting up corn in the bins of a corn-house, said in Whiting v. Brastow, 4 Pick. 311. So of a heater, placed loose in the vat of a tannery. Savage, Ch. J., in Raymond v. White, before cited. The case of the stove has been questioned, as I shall notice hereafter.

The cases of constructive annexation, where the article is seldom or never corporally attached to the realty, are few, and may be set down as exceptions to the general rule. They are said to be the charters or deeds of an estate and the chest containing them, deer in a park, fish in a pond, and doves in a dove house. 2 Com. Dig. "Biens," B; 6 Greenl. 157; 3 Dane, Abr. 156; 3 N. H. 505. The deer, fish, and doves are set down by Amos & F. Fixt. 168, as heirlooms; and so of various other animals. Heirlooms are a class of property distinct from fixtures. But "the doors, windows, locks, keys, and rings of a house will pass as fixtures, by a conveyance of the freehold, although they may be distinct things; because they are constructively annexed to the house." Amos & F. Fixt. 183, and the books there cited. Many other obvious cases may be supposed. One is, our ordinary Virginia fence on country farms. No vendor would consider that as mere personal property. And in Kittredge v. Woods, 3 N. H. 503, it was held that manure lying about a barnyard passed by a conveyance of the land as an incident.

These instances seem fully to justify the courts when they speak of the great difficulty in fixing on any certain criterion which shall govern all cases. They lead to a strain of reasoning by Mr. Dana, in the 3d volume of his Abridgment (page 156) as well by Weston, J., in Farrar v. Stackpole, by which, if followed out in practice, the machinery now in question might well be considered as a part of the realty, and therefore the subject of partition. Mr. Dana says, that in all the instances put by him, the articles "are very properly a part of the real estate and inheritance, and pass with it, because not the mere fixing or fastening to it is alone to be regarded; but the use, nature, and intention." Mr. Dana questions the decision in Williams v. Bailey, before cited, denying that the stove passed. 3 Dana, Abr. 157. See, also, Amos & F. Fixt. 154, 155. And Weston, J., says (6 Greenl. 157): "Modern times have been fruitful of inventions and improvements, for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning-rods, which have now become common in this country and in Europe. These might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are, doubtless, part of the inheritance, and would pass by deed as appertaining to the realty. But the genius and enterprise of the last half century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes, for the saving of human labor. Hence, there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron, and marble; some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have, in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building which shelters, encloses, and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts, or the building, but it would be a very narrow construction, which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence, in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms, applied to new subjects, as they arise. In other words, it will understand words used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptation." He then supposed the steam saw-mill at Bath to be conveyed by its name of a steam saw-mill, and adds: "If you exclude such parts of the machinery as may be detached without injury to the other parts, or to the building, you leave it mutilated and incomplete, and insufficient to perform its intended operations. The parties, in using the general term, would intend to embrace whatever was essential to it, according to its nature and design; and the law would, doubtless, so construe the conveyance as to effectuate the lawful intention of the parties." In aid of these views, undoubtedly, comes the reasoning of Lord Mansfield on the question between the heir and executor respecting the salt-pans. Lawton v. Salmon, 1 H. Bl. 259, note, 3 Atk. 16, note 1. "The present case is very strong. The salt spring is a valuable inheritance; but no profit arises from it unless there is a salt-work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessaries necessary to the use and enjoyment of the principal. The owner erected them for the benefit of the inheritance. He could never mean to give them to the executor," &c. This case shows how the fire engines in Lawton v. Lawton, 3 Atk. 12, erected by the tenant for life, and there claimed by and allowed to his executor against the remainder-man, would have been decided, had the question been between the executor and heir, or vendor and vendee. The case of the cider-mill fixed in the ground, which was awarded to the executor as against the heir, turned upon a custom. 3 Atk. 14, note 2; 1 H. Bl. 260. Mr. Wilbraham,

who argued for the executor and against the remainder-man, (in 3 Atk. 14), and who succeeded, still gave his opinion, when the salt-pan case came before Lord Mansfield, that it would have been different in respect to the heir; and Lord Mansfield expressly adopted his opinion. These salt-pans were very slightly fixed with mortar to the floor, and might be removed without injuring the buildings. A steelyard hung in a machine house was considered a fixture. Rex v. Inhabitants of St. Nicholas, Gloucester, Cald. 262. It was fixed for weighing coal and other things brought to market. Lord Mansfield said it must be annexed to the freehold in the nature of the thing. "What is the house? It is the machine house. They are one entire thing, and are together rated by the common known name which comprehends both: and the principal purpose of the house is for weighing. The steelyard is the most valuable part of the house. The house, therefore, applied to this use, may be said to be built for the steelyard, and not the steelyard for the house." One question was whether the whole machine was rateable as real estate, the steelyard inclusive, for the support of the poor. Messrs. Amos & Ferard, speaking of this case, say, "The machine which had been rated was clearly affixed to the freehold, and the court seem to rely upon that circumstance in delivering their judgment." Amos & F. Fixt. 209. They then advert to another case in Cald. 266. It is Rex v. Hogg. There the sessions rated a building by the name of "the engine house." The sessions stated, at first, that "the engine is not fixed to the premises, but capable of being moved at pleasure." The whole building and machine were assessed at £36, though the building, independent of the machine, was worth only two guineas. The court directed the case to be re-stated. They required the sessions to state whether the engine was worked "with water or horses; whether the house was a dwelling-house, or built for the purpose of receiving the engine, and whether it was used for any other purpose; and in what manner the engine was put up in the engine house, and what its size and bulk." The counsel afterwards consented to a set of facts; among them, they agreed "that the engine was worked generally with water, but frequently by hand; that the building was not a dwelling-house, nor was it erected for the purpose of receiving the engine, but formerly was used for the purpose of turning bobbins, and as a weaver's shop; but is now used for the purpose of carrying on the cotton manufactory, there being in the same building two other engines, one of which was used for the purpose of carding and the other for tumming cotton, which tumming is another process of the same manufactory. All the engines are placed on the floor, and noways annexed or fastened to the same, but may be moved at pleasure, and carried out and worked in any other place, either by means of water or manual labor, and are not adapted to any particular building. The frame in which the engine stands is twelve feet in length, three feet eleven inches in breadth, and two feet nine inches in height; the semi-diameter of the largest cylinder, with a small roller at the top, rising twenty inches above the frame, the engine sinking in the same seventeen inches." Still the difficulty as to annexation remained; for one question was, whether the machine was rateable except as a part of the real property. Caldecott, in support of the assessment, complained that the return was evasive in merely saying that the engine was not annexed or fastened to the floor; whereas it might be fastened to the building in some other way. The opposing counsel said it was placed on the floor like a chair. Ashurst, J., said the case was still imperfect; for it is not stated negatively, that this engine, while it is in a state of working, is not in some way or other fixed to the house. It is only stated that it is not fixed to the floor; but it may be fixed to the walls of the building without being fixed to the floor. We can assume no facts on either side; but one should suppose that it must be fastened in some way, otherwise, as it is worked by water, the weight of the water must displace it; and if so, it is exactly the case of Rex v. Inhabitants of St. Nicholas, in Gloucester. Buller, J., said, speaking of the right to the engine as between executor and heir, or tenant and landlord, "If the engine were clearly distinct, it would, in all cases, go to the executor. But here, all being under lease for a term, all would go to the executor. Grose, J., said: "This is an engine house fitted up with an engine, but whether that is fixed or not is uncertain. The engine is evidently a part of the house; for Walmesley is stated to be lessee of the premises, which comprehend the whole, both house and engine. I therefore consider this as an entire thing." Messrs. Amos & Ferard, in commenting upon this case, admit that it is generally considered as deciding that a poor rate may be assessed on mere personal property rented with a building. But, they say, the better opinion seems to be that it cannot; and they seem to rely on what Ashurst, J., said, as showing that the engine was probably considered real estate.

The two last cited cases seem to allow that the slightest permanent annexation of machinery is sufficient to make it a part of the realty; and sustain the reasoning of Weston, J., in Farrar v. Stackpole, so far as it maintains that the chain was a fixture, because it was hooked for use as a part of the permanent machinery. He said: "The chain is the last in the parts of the machinery, to which the impelling power is communicated, to effect the object in view. Its actual location in the succession of parts can make no difference." See, also, the remarks of Amos & F. Fixt. p. 4, note (a) on the case of Davis v. Jones, 2 Barn. & Ald. 165. A later case is somewhat material. Colegrave v. Dias Santos, 2 Barn. & C. 76, was decided in Tr. term, 1823, by the king's bench. 3 Dowl. & R. 255. It arose between the vendor and vendee of a mansion house with the lands, called "Downsell Hall," in Essex. A conveyance was executed, and the defendant entered into possession. To the house belonged certain arti-

cles which were all taken possession of with it by the vendee, and none of them had been excepted either in the particulars of the sale, which was by auction, or the deed of conveyance. They consisted chiefly of "bells and bell-pulls, stoves, grates, blinds, shelves, coppers, a water-butt, and other articles of the same kind" (3 Dowl. & R. 255); or, according to 2 Barn. & C.: "Stoves, grates, kitchen-ranges, closets, shelves, brewing-coppers, cooling-coppers, mash-tubs, locks, bolts, blinds," &c. The plaintiff, the vendor, demanded them all of the defendant, the vendee, by the name of fixtures; and, on the latter refusing to deliver them, brought trover; which it was held would not lie for any of them. It was conceded that some of the articles might be movables. In 2 Barn. & C., Abbott, C. J., said, "three or four trifling articles." What they were is not stated by either report; but the recovery was denied for the whole, inasmuch as there was a general demand and refusal of the whole as fixtures. Maryatt and Platt mentioned stoves, bell-pulls, shelves, and water-butts, as movables, none of which were permanently attached to the house, or could be considered as part of it. Bayley, J., asked: "Is that so clear? To whom would such articles pass, the heir or executor?" The counsel submitted they would pass to the executor. Best, J., asked: "Is not Wynne v. Ingleby, 1 Dowl. & R. 247, a case of ranges, ovens, and set-pots, taken by a fi. fa. against the owner of the freehold (see s. c. nom. Winn v. Ingilby, 5 Barn. & Ald. 625), an express decision to the contrary? Has the vendor a right to dismantle a house in order to remove such articles?" For this colloquy, see 3 Dowl. & R. 256. I cannot learn from the books that there has been much litigation concerning fixtures as between vendors and vendees of houses since the decision of Colgrave v. Dias Santos. The rule of that case has lately been held to prevail as between mortgagor and mortgagee. Longstaff v. Meogoe, 2 Adol. & E. 167. Yet the English cases are extremely difficult to reconcile, especially those which have arisen between heir and executor. See Amos & F. Fixt. p. 151, c. 4, § 2.

There is also considerable conflict in the American cases, as may be seen by those which I have cited. The inconsistency appears to have arisen occasionally from not attending to the distinction maintained by the older cases, between the two relations of vendor and vendee, and tenant and landlord; though sometimes it has also arisen from a difference as to the mode of annexation. In Powell v. Manufacturing Co., 3 Mason, 459, Fed. Cas. No. 11,357, both the New York and Massachusetts cases were cited, to prove that the wheel and gearing of a cotton factory were not to be considered a part of the freehold, in such sense that the widow could have dower of them. Story, J., was driven to say that the carding machine in Gale v. Ward, though attached to the wheel by a leather band, was not strictly a fixture; and that the fastening in Cresson v. Stout, would not make the machinery so. Yet certainly the wheel, and most, if not all, the gearing mentioned and described in 3 Mason, and Fed. Cas. No. 11,357, might have been as easily removed as many other things attached to the freehold, which have been treated as movables. The case of the cotton gin, (in 1 Bailey, 540) the English steelyard and engine cases cited from Caldecott, and Colgrave v. Dias Santos, with several other English cases, show that a very slight affixing for permanent use is sufficient. The mere hooking of a chain in Farrar v. Stackpole, was sufficient under the circumstances. Why is the key of a door-lock deemed a fixture? Because it makes a part of the permanent machinery used to secure the door. Yet it is kept entirely separate, except when employed in locking and unlocking the door. The mode of annexation must evidently depend on the manner in which the parts of machinery are used. The saws in the saw-mill may be in two sets, one at work, while the other is undergoing repairs, or filing and sharpening; and either may be easily removed without violence to the frame where they belong; are either to be considered the less fixtures for these reasons? Gibbons says, if a copper fastened in brick-work have a movable cover, the latter is a fixture; because the copper is the principal thing and the latter a mere appendage. Gib. Fixt. 17. The case of Davis v. Jones, 2 Barn. & Ald. 165, has accordingly been thought unexplainable by the principles professedly adopted in the case itself. Certain jibs making part of an entire machine, which was clearly a fixture, were treated as mere personal property. See Amos & F. Fixt. p. 4, note (a).

The ancient distinction, however, between actual annexation and total disconnection, is the most certain and practical; and should therefore be maintained, except where plain authority or usage has created exceptions. The reasoning of Mr. Dane, and of the learned judge in Farrar v. Stackpole, before cited, while it cannot be too extensively applied to modern machinery in subordination to that distinction, does not appear to be sustained by authority, when it seeks to raise a general doctrine of constructive fixtures, from the moral adaptation of what is in fact a mere movable, to the carrying on a farm or factory, &c., however essential the movable may be for such purpose. The argument in that shape proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures, without utterly confounding the rule by which the rights of the heir or the purchaser have been long governed. The judicial application of the rule is already sufficiently nice and difficult. As between heir and executor, it was partially altered by 2 Rev. St. (2d Ed.) p. 24, § 6, subd. 4. By this, "things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support," pass to the executor. And see 3 Rev. St.

(2d Ed.) pp. 638, 639. This provision certainly indicates anything but a legislative intent to enlarge the rights of freehold. Taken literally it would strip the heir of the wheels, gearing, and all the other machinery fixed in the ordinary way to a mill or manufactory inherited by him. It is certainly contrary to the ancient common law (see 11 Vin. 167, "Executor, Z," pl. 6; Amos & F. Fixt. 133, and cases there cited on to page 138), and seems to derive very questionable countenance from more modern authority. Squire v. Mayer, a short note of which is given in 2 Freem. 246, goes the farthest towards our statute rule; but how very doubtful this and some other modern causes of the like tendency are, may be seen by Amos & F. Fixt. p. 151, c. 4, § 2, and cases there cited. See, also, Gib. Fixt. 11, 12. As between devisee and executor, the suggestion of Vice-Chancellor Hart, in Lushington v. Sewell, 1 Sim. 435, 480, seems to go beyond any adjudged case in favor of the freehold. He inclined to think that the devise of a West India estate would pass the incidental stock of slaves, cattle, and implements; because such things are essential to render the estate productive; and, denuded of them, it would be rather a burden than a benefit.

It is, I think, obvious, not only from our statute, but from both the English and American cases, that there is a stronger tendency to consider fixtures for the purposes of trade as mere personal property, than we find either in regard to those of an agricultural or domestic character. See Gib. Fixt. 10, 11; Amos & F. Fixt. (Ed. 1830) 138. By several English cases cited in these treatises, the executor was in respect to trade fixtures preferred in his claim against the heir, though the doctrine is far from being settled. By several American cases, we have seen that such fixtures were denied to have passed even as between the vendor and vendee of the freehold; though such a rule derives no countenance, or certainly very little, from any English authority; and seems to be against the weight of American adjudication.

On the whole, I collect from the cases cited, and others, that, as a general rule, in order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm, or lot, &c., or in terms denoting a mill or factory, &c., nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building. I am not prepared to deny that a machine movable in itself would become a fixture from being connected in its operations by bands, or in any other way, with the permanent machinery, though it might be detached, and restored to its ordinary place, as easily as the chain in Farrar v. Stackpole. I think it would be a fixture notwithstanding. But I am unable to discover, from the papers before us, that any of the machines in question before the commissioners were even slightly connected with the freehold. For aught I can learn, they were all worked by horses or by hand, having no more respect to any particular part of the building, or its water-wheel, than the ordinary movable tools of such an establishment. These would have their common place, and be essential to its business. So a threshing machine and the other implements of the farmer. But it would be a solecism to call them fixtures, where they are not steadily or commonly attached, even by bands or hooks, to any part of the realty. The word fixtures is derived from the things signified by it being fastened, or fixed. "It is a maxim of great antiquity, that whatever is fixed to the realty is thereby made a part of the realty, to which it adheres, and partakes of all its incidents and properties." Toml. Law Dict. "Fixtures." Hence fixtures are defined to be "chattels or articles of a personal nature which have been affixed to the land." Id. "It is an ancient principle of law," says Weston, J., in Farrar v. Stackpole, "that certain things, which, in their nature, are personal property, when attached to the realty, become part of it as fixtures." And see Amos & F. Fixt. p. 1, c. 1.

It is not to be denied that there are strong dicta, and perhaps we may add the principle of several adjudicated exceptions, upon which we might, with great plausibility, declare the machines in question, so essential to the purposes of the manufactory, although entirely dissociated with the freehold, a fit subject for entering into the list of constructive fixtures. The general importance of the rule, however, which goes upon corporal annexation, is so great, that more evil will result from frittering it away by exceptions, than can arise from the hardship of adhering to it in particular cases.

Nor can we possibly say, as in the case of the steelyard or engine in the cotton manufactory, cited from Caldecott, that the machines in question must, in the nature of the thing, be annexed to the freehold. It appears, by the papers before us, that they have been used with the factory for several years, and have passed with it in conveyances. But the affidavits do not state that they are affixed in any way. They are treated by both parties, for aught I can see, as entirely detached, though the defendant ventures to express an opinion that some of them constitute a part of the factory itself. He gives no particulars, however, from which we can say they may make a part, any more than if they were so many chairs to sit on.

It is true, that this factory seems to have been pretty much dismantled. The principal part of its machinery has been treated as mere movables. Both the defendant and Mr. Smith, one of the commissioners, concur in stating that nothing about the factory was treated as a fixture, except the water-wheel, fulling-mill, dye-kettle, press, and tenter-bars; and Mr. Smith says the factory was impelled by a valuable water-power. The suspicion would, indeed, be quite strong, from such facts standing alone, that, at least, some of the important and

valuable machinery excepted, might be brought within the legal notion of fixtures; and yet the defendant himself has not ventured to state, as I can find, that any part of the particular machinery excepted from the report, was in the least dependent for its operation on the water-wheel or other permanent parts of the factory; while Mr. Goodrich, one of the commissioners, says, in his affidavit, that the excepted machinery was not affixed to the building or land. There the case is left; not one of the deponents pointing out any connection whatever. No authority cited on the argument, nor any that I have seen, goes so far as to say that mere loose and movable machines totally disconnected with, and making no part of the permanent machinery of a factory, can be considered a fixture even as between vendor and vendee. We think the motion must be denied with costs, and the report of the commissioners is confirmed.

LASSELL v. REED.

(6 Greenl. 222.)

Supreme Judicial Court of Maine. 1829.

Mr. Crosby, for plaintiff. Mr. Johnson, for defendant.

MELLEN, C. J. Upon examination of the lease referred to in the statement of facts, we do not perceive any covenants on the part of Reed which have any direct bearing on the questions submitted for our decision. Nothing is said as to the management of the farm in a husbandlike-manner, or surrendering it at the end of the year in as good order and condition as it was at the commencement of the lease. The lease is also silent on the subject of manure. The same kind of silence or inattention has been the occasion of the numerous decisions which are to be found in the books of reports between lessors and lessees, mortgagors and mortgagees, and grantors and grantees, or those claiming under them, in relation to the legal character and ownership of certain articles or species of property, connected with or appertaining to the main subject of the conveyance or contract. A few words, inserted in such instruments, expressive of the meaning of the parties respecting the subject, would have prevented all controversy and doubt. In the absence of all such language, indicating their intention as to the particulars above alluded to, courts of law have been obliged to settle the rights of contending claimants, in some cases according to common understanding and usage; thus window blinds, keys, &c., are considered as part of the real estate (though not strictly speaking fixtures), or rather as so connected with the realty as always to pass with it. In other cases, as between landlord and tenant, the question has been settled upon the principles of general policy and utility; as in the case of erections for the purpose of carrying on trade, or the more profitable management of a farm by the tenant. It does not appear by the facts before us, that there is any general usage, in virtue of which the manure made on the farm by the cattle of the lessee during the term of his lease is considered as belonging to him exclusively, or to the lessor, or to both of them; and we have not been able to find any case directly applicable to the present. There being no usage, nor such decision, nor expressed intention of the parties to guide us, the case is one which must be decided on the principles of policy and the public good; for we do not deem the case cited from Espinasse as applicable. The opinion there given was founded on certain expressions in the lease, by means of which the lessee was considered as a trespasser in removing the manure from the farm at the end of the lease.

What then does policy and the public good dictate and require in the present case? Before answering the question we would observe that we do not consider the case in any way changed by the fact that a part of the fodder was carried on to the farm by the defendant, and a part of the cattle on the farm were those leased; for the purposes of the lease, such fodder and such cattle must be considered as belonging to the tenant during the term; and he must be considered as the purchaser of the fodder growing on the land, by the contract of lease, as much as if he should purchase it elsewhere on account of the want of a sufficiency produced by the farm; because a farm not yielding a sufficiency would command the less rent on that account. Numerous cases show that a tenant, at the termination of his lease, may remove erections made at his own expense for the purpose of carrying on his trade; because it is for the public good that such species of enterprise and industry should be encouraged; and where the parties are silent on the subject in the lease, the law decides what principle best advances the public interest and accords with good policy, and by that principle settles the question of property. It is our duty to regard and protect the interests of agriculture as well as trade. It is obviously true, as a general observation, that manure is essential on a farm; and that such manure is the product of the stock kept on such farm and relied upon as annually to be appropriated to enrich the farm and render it productive. If at the end of the year, or of the term where the lease is for more than a year, the tenant may lawfully remove the manure which has been accumulated, the consequence will be the impoverishment of the farm for the ensuing year; or such a consequence must be prevented at an unexpected expense, occasioned by the conduct of the lessee; or else the farm, destitute of manure, must necessarily be leased at a reduced rent or unprofitably occupied by the owner. Either alternative is an unreasonable one; and all the above-mentioned consequences may be avoided by denying to the lessee what is contended for in this action. His claim has no foundation in justice or reason, and such a claim the laws of the land cannot sanction. It is true that the defendant did not remove and carry away any manure, except what was lying in heaps, probably adjoining the barn in the usual places; but still if he had a right to remove those heaps, why had he not a right to travel over the farm and collect and remove as much as he could find scattered upon the ground during the summer and autumn by the cattle in their pastures? In both instances the manure was the product of his cattle; yet who ever claimed to exercise such a right, or pretended to have such a claim? The argument proves too much, and leads to impossibilities in practice, as well as to something in theory which bears a strong resemblance to an absurdity.

We do not mean to be understood by this opinion, as extending the principles on which it is founded to the case of tenants of livery stables in towns, and perhaps some other estate, having no connection with the pursuits of agriculture; other principles may be applicable in such circumstances; but as to their application

or their extent we mean to give no opinion on this occasion.

The case most nearly resembling the present is that of Kittredge v. Woods, 3 N. H. 503, in which it was decided that when land is sold and conveyed, manure lying about a barn upon the land, will pass to the grantee, as an incident to the land, unless there be a reservation of it in the deed. The chief justice observed that the question would generally arise between lessor and lessee, and very plainly intimates an opinion that a lessee, after the expiration of his lease, would have no right to the manure left on the land. On the whole, we are all of opinion that the defence is not sustained, and that the defendant must be called. According to the agreement of the parties, judgment must be entered for $15.00 and costs.

HARRIS v. SCOVEL.

(48 N. W. 173, 85 Mich. 32.)

Supreme Court of Michigan. Feb. 27, 1891.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Fraser & Gates, for appellant. Cutcheon, Stellwagen & Fleming, for appellee.

MORSE, J. This is an action in trover for the conversion of 2,000 fence-rails, commenced in justice court, and subsequently appealed to the circuit court of Wayne county. Plaintiff recovered judgment in both courts. The plaintiff, in the partition of real estate, February 6, 1886, became the owner of a piece of land 17 feet wide and 1,601 feet in length. There was then a fence on the land which, before the partition, made a lane. She sold the land to defendant October 3, 1888. The deed of conveyance was a warranty deed in the ordinary form. Having no use for a lane on the premises, about a year before she sold to the defendant the plaintiff took down the fence, and piled up the rails on the premises, intending, as she testifies, to remove them to a farm that she owned in Dearborn. She had drawn 84 posts upon this land, and made some preparation to build a board fence as a division fence between her land and that of others, as, at the time the partition was made, it left the premises allotted to her open and unfenced. She testified, against objection, that at the time she made the agreement with defendant to sell him the land she reserved the rails. There was no reservation in the deed. The rails, prior to being piled up by plaintiff, had been in this lane fence nearly 50 years. Plaintiff had no use for the lane after the partition. Defendant testified that plaintiff, when making the agreement to sell, wanted to reserve the rails, but he would not consent to it, and bought the place as it was. The circuit judge submitted the question to the jury, instructing them that the rails piled upon the premises, and not being in any existing fence at the time of the sale, were personal property, and that, unless they found that the plaintiff sold the rails to the defendant,—agreed that they should go with the land,—she was entitled to recover. The court was right, and the judgment must be affirmed. Rails piled up, under the circumstances that these were, are personal property. There can be no claim that fence-rails are of necessity part of the realty unless they are in a fence, and even in such case they may remain as personalty, if such be the agreement between the parties interested at the time the fence is built. Curtis v. Leasia (Mich.) 44 N. W. 500. The contention is made, that plaintiff is estopped from claiming these rails because, following the description by metes and bounds of the premises in her warranty deed to defendant, the deed continues as follows: "Being the same premises which were assigned by said commissioners in partition to Mary E. Harris, * * * together with all and singular the hereditaments and appurtenances thereunto belonging," etc. It is argued that she thereby conveyed these rails, because they were a part of the realty when she received it in partition. We do not consider this statement in the deed to be, or to have been intended to be, a covenant that the premises were to be conveyed to defendant in exactly the same condition as to fences, timber, and growing crops as they were when she received them. Such a construction would be absurd. If the rails must pass under the warranty because of this clause, then she must also account, under such warranty, to the defendant for all the timber standing or crops growing upon the premises, when she received them by partition, which she may have removed since that time and before the sale to defendant. The deed cannot in reason be so construed. Affirmed, with costs. The other justices concurred.

SMITH v. BLAKE.

(55 N. W. 978, 96 Mich. 542.)

Supreme Court of Michigan. July 26, 1893.

Appeal from circuit court, Cheboygan county, in chancery; C. J. Pailthorp, Judge.

Action by Sarah I. Smith against Henry A. Blake to enjoin the removal of certain machinery from a foundry of which plaintiff is the mortgagee and purchaser at foreclosure sale. From a decree for plaintiff, defendant appeals. Affirmed.

George E. Frost, (Oscar Adams, of counsel,) for appellant. Henry W. MacArthur, (George W. Bell, of counsel,) for appellee.

HOOKER, C. J. Complainant is the owner of a mortgage upon certain premises in the city of Cheboygan, used as a foundry, machine shop, and blacksmith shop. This mortgage was made December 14, 1882, for $2,000, with interest at 8 per cent., and was foreclosed by advertisement, the premises being bid in for $2,402.61 by the complainant, who (the bill states) will become entitled to a sheriff's deed upon July 3, 1892, at which time her investment will amount to $2,594.82. The bill is filed to restrain the defendant from removing certain machinery upon the premises, viz.: One iron planer; one upright power drill; one shaper; three iron lathes; one wood lathe; one upright engine; one horizontal boiler; one band saw and frame; one rip saw and frame; one foundry cupola furnace and blower; the belting, shafting, pulleys, and boxes necessary for the running and management of the above machinery.

It is contended that the bill must be dismissed under the demurrer clause in the answer, for the following reasons, viz.: (1) The bill does not allege that the articles named are fixtures; (2) that it fails to show any claim of the property in controversy by the defendant, or threat of removal; (3) that no injunction can properly issue upon information and belief. Had a demurrer been filed, these objections would have been fatal. But the law does not favor the raising of technical questions after hearing upon the merits, and will not permit the dismissal of a bill upon a demurrer clause in the answer unless the bill is fatally defective, and past remedy by amendment. Barton v. Gray, 48 Mich. 164, 12 N. W. Rep. 30; Bauman v. Bean, 57 Mich. 1, 23 N. W. Rep. 451; Lamb v. Jeffrey, 41 Mich. 720, 3 N. W. Rep. 204. The bill impliedly states that these articles are part of the realty. When we read this sixth clause in the light of the whole bill, no other inference can be drawn. The failure to allege threats could have been the subject of amendment in the court below, and probably would have been had any one considered it necessary. Threats were not even proved, but, as defendant's answer claimed this property to be personalty, not covered by the mortgage, and this question was all that was litigated, we may consider the intention to remove admitted. This brings us to the merits of the case. The proof shows that all of these articles were placed in a building erected many years ago for a foundry and machine shop by the owner of both, and, while some of the machines were not fastened to the soil or building, they were heavy, and it was unnecessary. All were adapted to the business for which the building was erected. Furthermore, the preponderance of the proof shows that the parties understood that this property was to be covered by the mortgage. We think the decision of the circuit court in holding that the mortgage covered these articles was in accord with the Michigan authorities.

A point is made that an injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath of the complainant. That is true where the injunction sought is preliminary, but we see no reason why relief by injunction cannot be based upon proof presented upon the hearing. In this case, while the injunction should not have been allowed, it was permitted to stand until the hearing, and, "sufficient equity appearing," it should be perpetuated. Clark v. Young, 2 B. Mon. 57. The record may be remanded, with directions that complainant be allowed to amend her bill, whereupon the decree may stand affirmed. Complainant will recover costs of both courts. The other justices concurred.

MICHIGAN MUT. LIFE INS. CO. v. CRONK.

(52 N. W. 1035, 93 Mich. 49.)

Supreme Court of Michigan. July 28, 1892.

Error to circuit court, St. Clair county; Arthur L. Canfield, Judge.

Replevin by the Michigan Mutual Life Insurance Company against Edward Cronk. Judgment for plaintiff, and defendant brings error. Affirmed

Frank Whipple, for appellant. Phillips & Jenks, for appellee.

MONTGOMERY, J. The defendant, on the 18th day of June, 1887, contracted in writing to purchase of one William L. Jenks the N. W. ¼ of the S. W. ¼ of section 19, township 7 N., range 16 E. The contract was in the usual printed form, and contained a covenant on the part of the defendant that he would not commit, or suffer any other person to commit, any waste or damage to said lands or buildings, except for firewood or otherwise, for home use, while clearing off the lands in the ordinary manner. Immediately after entering upon the lands he erected a small dwelling house thereon, and lived in it for two years. He then made default in his payments, and the plaintiff, to whom the contract had in the mean time been assigned by Jenks, terminated the contract, and required the defendant to surrender possession. The house was a one-story frame house, 20 by 26, and suitable for the purposes of a dwelling house to be used upon the land in question. After the removal of the house from the premises, it was placed upon a 40 across the street, and plaintiff, after demand, brought replevin. The circuit judge directed a verdict for the plaintiff, and the defendant appeals.

Two questions only are presented in appellant's brief. It is first claimed that replevin will not lie, because the house had become a fixture upon the land to which it was moved, and was therefore real estate; second, that, as the house was occupied as a homestead by the defendant and his family, the wife was a necessary party. We think that when this house was erected upon the land held under contract it became a part of the realty, and as such the property of the owner of the land, subject only to the rights of the purchaser therein. Kingsley v. McFarland (Me.) 19 Atl. 442; Milton v. Colby, 5 Metc. (Mass.) 78; Iron Co. v. Black, 70 Me. 473; Tyler, Fixt. 78. It being severed from the land, it became personal property, and replevin would lie unless it became affixed to the realty by the tortious act of the defendant in removing it and placing it upon other lands. But we think no such legal effect can be given to the defendant's wrong. The house was moved upon land of a third party. There was no privity of title between the ownership of the house and the ownership of the land to which it was removed. The cases cited by defendant of Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, and Wagar v. Briscoe, 38 Mich. 587, do not apply. The house remaining personal property in the wrongful possession of defendant, it follows that no homestead right, which consists in an interest in lands, attached.

The judgment is affirmed, with costs. The other justices concurred.

CRAIG v. LESLIE.

(3 Wheat. 563-576.)

Supreme Court of the United States. 1818.

Robert Craig's will contained the following clause: "I give and bequeath to my brother, Thomas Craig, of Baith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted to him, according as the payments are made." Thomas Craig being an alien, the question was, could he take the proceeds of this land, which had been devised to one Leslie, in trust, the proceeds from the sale of which were to be paid to him?

Mr. Justice WASHINGTON delivered the opinion of the court. The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself.

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

[1] The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of Fletcher v. Ashburner, 1 Brown, Ch. 497, the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See Doughty v. Bull, 2 P. Wms. 320; Yates v. Compton, Id. 308; Trelawney v. Booth, 2 Atk. 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

[2] Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the cestui que trust, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. [3]So that in case of the death of the cestui que trust, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime.

In the case of Kirkman v. Milles, 13 Ves. 338, which was a devise of real estate to trustees upon trust to sell, and the moneys arising as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A. B. and C. The estate was, upon the death of A. B. and C., considered and treated as personal property, notwithstanding the cestui que trusts, after the death of the testator, had entered upon,

[1] Equity considers land, directed to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land.

[2] Where the whole beneficial interest in the land in one case, or in the money in the other, belongs to the person for whose use it is given, a court of equity will permit the cestui que trust to take the money or land at his election, if he elect before the conversion is made.

[3] But if the cestui que trust die, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done if the conversion had been made, and the trust executed in his lifetime.

and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds: "The opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held that without some act, it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases."

The same doctrine is laid down and maintained in the case of Edwards v. Countess of Warwick, 2 P. Wms. 171, which was a covenant on marriage to invest £10,000, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail male, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

[4] This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any farther investigation of it useless, were it not for the case of Roper v. Radcliffe, which was cited, and mainly relied upon, by the counsel for the state of Virginia.

The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus or the money to be paid as he, the said John Roper, by his will or otherwise, should appoint, and for want of such appointment, for the benefit of the said John Roper, and his heirs. By his will reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate, he gave to the said W. C. and T. R.

Upon a bill filed by W. C. and T. R. against the heir at law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them; the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favour of the papists, was, upon appeal to the house of lords, reversed, and the title of the heir at law sustained; six judges against five, being in his favour.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion; and then, 2d. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court.

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are, 1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. [5] 2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will, (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect,) results to the heir at law, as the old

[4] The case of Roper v. Radcliffe, 9 Mod. 167, examined.

[5] Land, devised to trustees, to sell for payment of debts and legacies, is to be deemed as money.

The heir at law has a resulting trust in such lands, after the debts and legacies are paid, and may come into equity and restrain the trustee from selling more than sufficient to pay them, or may offer to pay them himself, and pray a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property in either case will be land, and not money.

use not disposed of. Such was the case of Cruse v. Barley, 3 P. Wms. 20, where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave £200 to A. the eldest son, at the age of 21, and the residue to his four younger children. A. died before the age of 21, in consequence of which the bequest to him failed to take effect. The court decided that the £200 should be considered as land to descend to the heir at law of the testator, because it was in effect the same as if so much land as was of the value of £200 was not directed to be sold, but was suffered to descend. The case of Ackroyd v. Smithson, 1 Brown, Ch. 503, is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. Hewitt v. Wright, 1 Brown, Ch. Cas. 86.

[6] But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of Yates v. Compton, 2 P. Wms. 308, in which the chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that that was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of Fletcher v. Ashburner, before referred to, the suit was brought by the heir at law of the testator, against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes, that the case of Emblyn v. Freeman, and Cruse v. Barley, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative, or devisee, by which something has resulted to the heir at law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of Roper v. Radcliffe, 9 Mod. 167, is, that equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

[7] This has, in effect, been admitted in the preceding part of this opinion; because, if the cestui que trust of the whole beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

[8] But the court cannot accede to the conclusion, which, in Roper v. Radcliffe, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees it is deemed as money. It is admitted, with this qualification, that if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his life time, the property will then assume the character of land. But if he does not make this election, the property retains the character of personalty to every intent and purpose. The cases before cited

[6] But if the intent of the testator appears to have been to stamp upon the proceeds of the land directed to be sold, the quality of personalty, not only for the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal.

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[8] The conclusion—which, in Roper v. Radcliffe, is deduced from the above principles, that in respect to the residuary legatee such a devise shall be considered as land in equity, though in respect to the creditors and specific legatees, it is deemed as money—denied.

seem to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the conclusion made in the unqualified terms used in the case of Roper v. Radcliffe.

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before any thing can be made of the proposition, it should be shown that this right of privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true, that equity will extend this privilege in all cases to the cestui que trust. It will be refused if he be an infant. In the case of Seeley v. Jago, 1 P. Wms. 389, where money was devised to be laid out in land in fee, to be settled on A. B. and C., and their heirs, equally to be divided: On the death A., his infant heir, together with B. and C., filed their bill, claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of Foone v. Blount, Cowp. 467, Lord Mansfield, who is compelled to acknowledge the authority of Roper v. Radcliffe in parallel cases, combats the reasoning of Chief Justice Parker upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money.

This case of Walker v. Denne, 2 Ves. Jr 170, seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the cestui que trusts, though a feme covert, was held a sufficient indication of her intention that it should continue personal against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance, that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: In short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the cestui que trust is incapable to take or to hold the land beneficially, the right of election does not exist, and consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of Roper v. Radcliffe, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

[9] The incapacities of a papist under the English statute of 11 & 12 Wm. III., c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands, or profits out of lands; and all estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered, or done, to, or for the use of such person, or upon any trust for him, or to, or for the benefit, or relief of any such person, are declared by the statute to be utterly void.

Thus, it appears that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit, or relief, in or out of it. He is not only disabled from taking or having the benefit of any such interest, but the will or deed itself, which attempts to pass it, is void. In Roper v. Radcliffe, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so, (and it is not material in this case to affirm or deny that position,) then the will of John Roper in relation to the bequest to the two papists, was void under the statute; and if so, the right of the heir at law of the testator, to the residue, as a resulting trust, was incontestable. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable

[9] The case of Roper v. Radcliffe distinguished from the present case.

of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

[10] Now, what is the situation of an alien? He cannot only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received.[11] In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity, to have the land by escheat as if the alien had, or could upon the principles of a court of equity, have elected to take the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of Roper v. Radcliffe has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield in the case of Foone v. Blount, speaks of it with marked disapprobation; and we know, that had Lord Trevor been present, and declared the opinion he had before entertained, the judges would have been equally divided.

The case of the Attorney General and Lord Weymouth, Amb. 20, was also pressed upon the court, as strongly supporting that of Roper v. Radcliffe, and as bearing upon the present case.

The first of these propositions might be admitted; although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against papists, and the chancellor so considers it; for he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and encumbrances on land, for the benefit of a charity.

But if this case were, in all respects, the same as Roper v. Radcliffe, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case, the chancellor avoids expressing any opinion upon the question, whether the money to arise from the sale of the land, was to be taken as personalty or land; and, although he mentions the case of Roper v. Radcliffe, he adds, that he does not depend upon it, as it is immaterial whether the surplus was to be considered as land or money under the mortmain act.

Upon the whole we are unanimously of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

[10] An alien may take, by purchase, a freehold, or other interest in land, and may hold it against all the world except the king; and even against him until office found; and is not accountable for the rents and profits previously received.

[11] Vide 3 Wheat. 12. Jackson ex dem. State of New York v. Clarke, note c.

BOLTON et al. v. MYERS et al.

(40 N. E. 737, 146 N. Y. 257.)

Court of Appeals of New York. May 21, 1895.

Appeal from supreme court, general term, Second department.

Accounting by Henry B. Bolton and Thomas Bolton, as executors of the will of Ann Bolton, deceased. From a judgment of the general term (31 N. Y. Supp. 588) reversing a judgment of the surrogate denying the executors the right to reimburse themselves, out of the proceeds of a sale of the land, for debts of the testator paid by them out of their own funds, Sarah L. Myers and others appeal. Affirmed.

James R. Marvin, for appellants. Alex. Thain, for respondents.

O'BRIEN, J. In this proceeding it was held by the learned surrogate that the executors were not entitled to reimburse themselves out of the proceeds of the sale of real estate in their hands for the amount paid by them in discharge of the testator's debts over and above the sum realized for that purpose from the personal estate. The testator died September 27, 1882, and letters were granted to the executors in November following. In November, 1892, the executors accounted, and by the decree then entered it was adjudged that the estate was indebted to the executors on account of debts of the testator paid by them in default of personal assets in the sum of about $4,000. Subsequently there came to the hands of the executors a large sum received from the sale of certain real estate of the testator, and this accounting was in regard to that fund, and the executors claim that they should be allowed to retain sufficient of it to pay the debt due to them from the estate. The provisions of the will are as follows: After paying debts, then a bequest of certain household furniture to her daughter. Then a devise to her son of the house in which he lived. The executors were then directed to invest $1,500, the interest upon which was to be paid to a church, and to expend a reasonable sum in erecting a monument and putting the family cemetery in order. Then follows the power of sale in the following terms: "And I also give power and authority to my executors to sell any and all of my real estate, either at public or private sale, whenever, in their judgment, they may deem for the best interest of my estate, and to give good and sufficient deed or deeds of conveyance for the same." The residue of the estate was then bequeathed to her children. In the courts below, the right of the executors to enforce their claim in this proceeding is made to depend upon the scope and character of this power. It has been assumed in both courts that, unless this can be regarded as a power to the executors to sell real estate for the payment of debts, then the proceeds of the sale must still be regarded as real estate, and distributed to the devisees or persons who take the real estate under the will. The learned general term, reversing the surrogate, was of the opinion that it should be treated as a power of sale for the purpose of paying debts, upon the doctrine of the Gantert Case, 136 N. Y. 109, 32 N. E. 551. If it was necessary to establish that proposition, there would be great difficulty in sustaining the judgment. But we think it is not material to determine the scope and the character of the power. It was certainly a general power, and conferred authority upon the executors to convey the land and receive the proceeds. That power has been actually executed. They have conveyed the land, have received the purchase price, and the same is in their hands. There is no other way in which creditors can now reach the land except by proceedings for an accounting. The realty has in fact been converted into personalty, and is in the hands of the executors for all purposes of administration. Before distributing this fund to the residuary devisees, they may pay the balance of the testator's debts, and, what is the same thing, reimburse themselves for the debts they have paid in excess of the personal estate that came to their hands. Erwin v. Loper, 43 N. Y. 521; Hood v. Hood, 85 N. Y. 561; Glacius v. Fogel, 88 N. Y. 434; In re Powers, 124 N. Y. 361, 26 N. E. 940; In re Gantert, 136 N. Y. 109, 32 N. E. 551; Cahill v. Russell, 140 N. Y. 402, 35 N. E. 664. In this view we think the judgment of the general term was right, and should be affirmed, with costs. All concur. Judgment affirmed.

ADAMS v. ROSS.[1]

(30 N. J. Law, 505.)

Court of Errors and Appeals of New Jersey. June Term, 1860.

Error to supreme court.

A. O. Zabriskie, for plaintiff in error. J. P. Bradley, for defendant in error.

WHELPLEY, J. This writ of error brings up for review the judgment of the supreme court, giving a construction to a deed, dated the 9th of September, 1854, between Anna V. Traphagen, of the first part, and Catharine Ann V. B. Adams, wife of Alonzo Whitney Adams, of the second part, by which the grantor, in consideration of natural love and affection and of one dollar, conveyed to the grantee the premises in the deed described. The operative words are "grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, for and during her natural life, and at her death to her children which may be begotten of her present husband; to have and to hold the above described premises unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams."

The deed contains covenants of seizin, for quiet enjoyment, against encumbrances, for further assurance and of warranty.

These covenants are made by the grantor for herself and her heirs with the party of the second part, her heirs and assigns.

Mrs. Adams, at the date of conveyance to her, was a minor. On the 12th October, 1855, she, with her husband, executed a mortgage to secure the payment of $6000, in one year from date, upon the premises conveyed to her. She was then nineteen. The mortgage was to Ross, the applicant in the supreme court.

The Erie Railway Company, under the provisions of an act of the legislature, took a part of the land in question, and hold it in fee simple. The value of the land taken has been ascertained at $3061; that is now in the supreme court, to be awarded to the parties entitled to it, and who they are must depend upon the true construction of the deed.

What, then, are the rights of Mrs. Adams, her husband and children, one having been born of the marriage since the conveyance; and what, if any, are the rights of Ross, the mortgagee, to the money in court.

The supreme court held, that the estate granted by the deed was an estate in fee tail special in Catharine Adams and the heirs of her body by her present husband; that her husband was entitled to curtesy; that the mortgage to Ross on the interest of Mrs. Adams was void as to her, but was a lien upon the estate of her husband, in case he survived her.

This decision was reached by interpreting the word "children," in the deed, as equivalent to "heirs," calling in the covenants in aid of that interpretation, as throwing light upon what the court called the intention of the grantor.

The supreme court was right in holding the first estate conveyed to Mrs. Adams, not a fee simple; the express limitation of the estate to her during life, and after her death to her children, forbade any other conclusion. The covenant, warranting the land to her and her heirs general, cannot enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed. A party cannot be estopped by a deed, or the covenants contained in it, from setting up that a fee simple did not pass, when the deed expressly shows on its face exactly what estate did pass, and that it was less than a fee. Rawle, Cov. 420; Blanchard v. Brook, 12 Pick. 67; 2 Co. Litt. 385b.

Lord Coke expressly says: But a warranty of itself cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs; yet doth not this enlarge his estate.

Justice Vredenburgh, in his opinion, admits this to be law. He says, although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were used. What is that but enlarging what would otherwise be their meaning? If without explanation they are insufficient to pass the estate, does not the explanation enlarge their operation?

The learned judge, in his elaborate opinion, says: From these covenants, it is demonstrated that, by the terms "children by her present husband," the grantor intended the heirs of her body by her present husband. It follows, from this argument, that although the conveying part of the deed may not contain sufficient to convey the estate as a fee simple, for example, yet that if the covenants show an intent to pass a fee simple, it will pass.

The argument is, that the words of conveyance and covenant must be construed together. If the covenants look to the larger estate, that will pass upon the intent indicated. Children are said to be equivalent to heirs, because she warranted to her heirs; and the heirs are said to be not heirs general, because she called them children.

The inconsistency between the conveyance and covenant shows mistake in the one or the other. The safest rule of construction is that propounded by the supreme court; that the quantity of the estate conveyed must depend upon the operative words of conveyance, and not upon the covenants defending the quantity of estate conveyed.

Starting with that premise, it seems difficult, nay impossible, to reach the conclusion, that the covenants are to be looked to in the interpretation of the conveyance, as such.

The covenants only attach to the estate granted, or purporting to be granted. If a life estate only be expressly conveyed, the covenantor warrants nothing more. The conveyance is the principal, the covenant the incident. If they

[1] Order of the court omitted.

do not expressly enlarge the estate passed by the operative words of the deed, I cannot perceive upon what sound principle of construction they can have that effect indirectly by throwing light on the intention of the grantor. In the construction of a deed of conveyance the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital, showing the intention, will supply the omission, although it may preserve the rights of the party under the covenant for further assurance or in equity upon a bill to reform the deed.

The object of the covenants of a deed is to defend the estate passed, not to enlarge or narrow it. To adopt, as a settled rule of interpretation, that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and, in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries, than to open so wide a door for litigation, and render uncertain the titles to lands. The experience of courts in the construction of wills, the difficulty in getting at the real intent of the party, where imperfectly expressed, or where he had none; the doubt which always exists in such cases, whether the court has spelt out what the party meant, all combine to show the importance of adhering to the rule, that the grantor of a deed must express his intent by the use of the necessary words of conveyances, as they have been settled long ago by judicial decision and the writings of the sages of the law. Upon this point, it is not safe to yield an inch; if that is done, the rule is effectually broken down. Where shall we stop if we start here?

Littleton says: Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs for ever. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase: "to have and hold to him and his heirs." For these words, "his heirs," make the estate of inheritance. For if a man purchase lands by these words, "to have and to hold to him forever," or by these words, "to have and to hold to him and his assigns forever," in these two cases he hath but an estate for life, for that there lack these words, "his heirs," which words only make an estate of inheritance in all feoffments and grants.

"These words, 'his heirs,' doe not only extend to his immediate heirs, but to his heirs remote and most remote, born and to be born, sub quibus vocabulis 'hæredibus suis' omnes hæredes, propinqui comprehenduntur, et remoti, nati et nascituri, and hæredum appellatione veniunt, hæredes hæredum in infinitum. And the reason wherefore the law is so precise to prescribe certine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion." Co Litt. 1a, 8b; 1 Shep. Touch. 101; Com. Dig. tit. "Estate," A, 2; Prest. Est. 1, 2, 4, 5; 4 Cruise, Dig. tit. 32, c. 21, cl. 1.

There are but two or three exceptions to this rule. The cases of sole and aggregate corporations, and where words of reference are used "as fully as he enfeoffed me." A gift in frank marriage, &c., which are to be found stated in the authorities already cited.

These exceptions create no confusion; they are as clearly defined and limited as the rule itself.

The word "heirs" is as necessary in the creation of an estate tail as a fee simple. 1 Co. Litt. 20a; 4 Cruise, Dig. tit. 32, c. 22, § 11; 4 Kent, Comm. 6; 2 Bl. Comm. 114.

This author sets this doctrine in clear light. He says: As the word "heirs" is necessary to create a fee, so, in further limitation of the strictness of feodal donation, the word "body," or some other word of procreation, is necessary to make it a fee tail. If, therefore, the words of inheritance or words of procreation be omitted, albeit the other words are inserted in the grant, this will not make an estate tail, as if the grant be to a man, and his issue of her body, to a man and his seed, to a man and his children or offspring, all these are only estates for life, there wanting the words of inheritance.

The rule in Shelley's Case, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, that always in such cases the word "heirs" are words of limitation, and not of purchase (Shelley's Case, 1 Coke, 93; 4 Cruise, Dig. c. 23, § 3, tit. 32), requires the use of the word "heirs" to bring it in operation.

No circumlocution has been ever held sufficient. It is believed no case can be found where this rule has been held to apply, unless the word "heirs" has been used in the second limitation.

Neither the researches of the learned judge who delivered the opinion of the supreme court, nor those of the very diligent counsel who argued the case here, have produced a case decided in England, or in any state of this Union abiding by the common law, where, in a conveyance by deed, the word "children" has been held to be equivalent to "heirs." That this has been determined in regard to wills is freely conceded, but that does not answer the requisition. The reasoning of the supreme court is, to my mind, entirely unsatisfactory. In the administration of the law of real estate, I prefer to stand super antiquas vias, stare decisis; to maintain the great rules of property; to adopt no new dogma, however convenient it may seem to be. The refined course of reasoning adopted in the face of so great a weight of authority rather shows what the law might have been, than what it is.

I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent and all the judges who have administered it for three cen-

turies, and to adopt the dogma, that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous.

Under this deed, Mrs. Adams took an estate for life, which was not enlarged by the subsequent limitation to a fee tail. The remainder vested in Anna Adams, the child of the marriage, for life, subject to open and let in afterborn children to the same estate.

The deed operated as a covenant to stand seized. The proper and technical words of such conveyance are, "stand seized to the use of," &c., but any other words will have the same effect, if it appear to have been the intention of the parties to use them for that purpose. The words "bargain and sell, give, grant, and confirm," have been allowed so to operate. 4 Cruise, Dig. tit. 32, c. 10, §§ 1, 2.

By such a covenant, an estate may be limited to a person not in esse, if within the considerations of blood or marriage. Fearne, Rem. 288; 1 Rep. 154, 2; 1 Prest. Est. 172, 176; Doe v. Martin, 4 Term R. 39.

This deed, on the face of it, expresses the considerations of natural love and affection, as well as the money consideration of one dollar.

It follows, from these considerations, that Adams is not entitled to curtesy in the lands on surviving his wife. The mortgage to Ross created no valid charge on the estate against Mrs. Adams, she being a minor when it was executed.

Mrs. Adams' interest in the land was subject to the provisions of the act for the better securing the property of married women, passed March 25th, 1852; the deed to her was after this act passed.

This was clearly a gift or grant, within the meaning of the act. The legislature did not intend to limit the benefits of the act to property conveyed by a deed operating as a gift or grant; all the ordinary modes of acquiring property by deed were intended by the use of the terms gift, grant. The reasoning of Justice Vredenburgh upon this point is conclusive. Upon the determination of the respective life estates, the land reverts to Miss Traphagen.

The judgment of the supreme court must be reversed. The money in court must be invested for the benefit of Mrs. Adams for life, and after her death for the benefit of the surviving children of the marriage in equal shares, during their respective lives, and at their deaths, respectively, their several shares must be paid to Miss Traphagen, or if she be then dead, to her heirs or devisees.

COMBS, GREEN, RISLEY, VAN DYKE, WOOD, CORNELISON, HAINES, and SWAIN, JJ., concurred.

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BROWN v. ADDISON GILBERT HOSPITAL.

(29 N. E. 625, 155 Mass. 323.)

Supreme Judicial Court of Massachusetts. Essex. Jan. 7, 1892.

Appeal from superior court, Essex county.

Bill by Eben T. Brown against the Addison Gilbert Hospital, for specific performance of an agreement for the sale of certain real estate. Plaintiff derived his title to the lands in question from the fifth clause of the will of Jonathan Brown, which is as follows: "I give and devise to my grandson Eben Brown, the son of my son Jonathan, the farm as hereinbefore described, subject to the life-estate therein given to my son Jonathan, and subject, also, to the limitation that, if said Eben die without issue, then his devise is to go to other son or sons of my son Jonathan, if any there should be, and, if not, to the heirs of my son Jonathan, forever." Defendant avers that the plaintiff cannot convey a good and clear title to said land, as his estate in said land is a fee determinable in the event of his dying leaving no issue living at his decease, with an executory devise over to others. Complainant obtained a decree, and defendant appeals. Affirmed.

C. A. Russell, for plaintiff. J. J. Flaherty, for defendant.

BARKER, J. The testator devised to his son Jonathan the improvement, rents, and use of a certain farm, for and during the term of his natural life; and, by a subsequent clause of his will, gave and devised to Eben, "the son of my son Jonathan, the farm as hereinbefore described, subject to the life-estate therein given to my son Jonathan, and subject, also, to the limitation that, if said Eben die without issue, then his devise is to go to other son or sons of my son Jonathan, if any there should be, and, if not, to the heirs of my son Jonathan, forever." The will was admitted to probate on February 16, 1847. The testator's son Jonathan is now dead, and never had any son but Eben. Eben is childless and unmarried, and is now in possession of the farm, claiming title under the will. By the devise, without express words of inheritance, of the farm, subject to the life-estate of his father, Eben would take a fee, unless it clearly appeared by the will that the testator intended to give him a less estate. Rev. St. c. 62, § 4; Briggs v. Shaw, 9 Allen, 516; Goodwin v. McDonald, 153 Mass. 481, 27 N. E. 5. The defendant contends that Eben's estate is a fee determinable upon his own death without issue surviving him, and that upon such death the heirs of the testator's son Jonathan will take by way of executory devise. Eben claims that he is in of an estate tail, his fee being cut down by the implication in favor of his issue as objects of the testator's bounty, and that the devise over, if he die without issue, is a remainder in expectancy after his estate tail. Another possible construction might be that Eben's remainder was intended to be an absolute fee, subject to be divested in favor of the other son or sons of the heirs of Jonathan, if Eben died without issue before the death of Jonathan, but with which nothing could interfere if Eben survived Jonathan. Unless the construction which gives to Eben only a determinable fee, and to the other son or sons or the heirs of Jonathan an executory devise, is a correct one, Eben can convey a good title to the property. Against that construction, in our opinion, the following considerations must prevail: There is no reason to suppose that the testator desired to create an executory devise for the benefit of any specific persons known to him, and whom he desired to make objects of his bounty. There were never any other son or sons of Jonathan. The testator must have supposed that such might be born, and, they being younger than Eben, it would not be absurd to suppose that they might possibly survive both Eben and his children. The devise over to such son or sons is therefore not conclusive that the testator intended a definite failure of issue at Eben's own death. The alternative devise to the heirs of the testator's son Jonathan provided for some one to take upon an indefinite failure of Eben's issue, however remote the failure might be, if there should then be living any of the testator's own blood. The testator's language did not refer to any existing person when he spoke of "any other son or sons of Jonathan." Taking the whole will together, his intention was to keep the farm in the family of his son Jonathan, giving the benefit of it to Eben, Jonathan's then only and so eldest son, and to Eben's issue so long as there should be such issue; but if such issue should fail, then to the other son or sons of Jonathan, if such should possibly have come into being and be then living; and, if there were no such other sons then living, to Jonathan's heirs, whoever they might be. The testator used language which so long has received a technical construction that it was said by this court, in the year 1809, to have become a rule of property; and, unless the contrary clearly appears, he should be held to have used it in its technical sense. Ide v. Ide, 5 Mass. 501; Parker v. Parker, 5 Metc. (Mass.) 134; Hayward v. Howe, 12 Gray, 51; Allen v. Trustees, 102 Mass. 262, 264. When he devised the farm over, "if Eben die without issue," he meant the devise over to take effect upon an indefinite failure of Eben's issue; and he intended by the whole provision to give to Eben an estate tail, and to the possible other son or sons of Jonathan, who in fact never were born, or to Jonathan's heirs, a remainder in expectancy after the estate tail, and not an executory devise. Nightingale v. Burrell, 15 Pick. 110; Hall v. Priest, 6 Gray, 18, 20. The result is that, the construction of the will which gives to Eben a determinable fee, and to the heirs of Jonathan a future interest by way of executory devise, being untenable, Eben can convey a good title.

Decree affirmed.

BOYKIN et al. v. ANCRUM et al.

(6 S. E. 305, 28 S. C. 486.)

Supreme Court of South Carolina. April 17, 1888.

Appeal from common pleas circuit court of Kershaw county; Norton, Judge.

Action by Elizabeth B. Boykin and others against W. A. Ancrum and others to recover possession of lands to which plaintiffs claimed title under the will of William Ancrum, deceased. The case was referred to a master, whose decisions were partially affirmed and partially reversed by the circuit court on appeal. From this decree both parties appeal.

W. M. Shannon, for plaintiffs. J. T. Hay, for defendants.

McGOWAN, J. In the year 1831 William Ancrum died, leaving a will, by the fifth clause of which he devised as follows: "And as to my real estate I give and bequeath and devise unto my dearly-beloved wife, Julia, my dwelling-house situate in the town of Camden, with the appurtenant lands and hereditaments thereunto belonging, * * * for and during the term of her natural life. From and after the decease of my said dearly-beloved wife, I give and bequeath and devise my said dwelling-house * * * to my eldest son, Fowler Brisbane Ancrum, for and during the term of his natural life; and from and after his decease to his lawful issue, absolutely and in fee-simple. If my eldest son, Fowler Brisbane Ancrum, should die, leaving no lawful issue at the time of his decease, then and in such case I give, bequeath, and devise my dwelling * * * to my second son, William Alexander Ancrum, for and during the term of his natural life; and from and after his decease to his lawful issue, absolutely and in fee-simple. But if my said second son, William Alexander Ancrum, should die, leaving no lawful issue at the time of his decease, then and in such case I give, bequeath, and devise my said dwelling, etc., to my third son, Thomas James Ancrum for and during the term of his natural life; and from and after his decease to his lawful issue, forever and in fee-simple," etc. The eldest son, Fowler Brisbane Ancrum, died early, without lawful issue at the time of his death. The second son, William Alexander Ancrum, purchased the life-estate of his mother, Julia, (afterwards Mrs. Glass,) in 1837, (the deed, however, was not proved;) and thus being, as he doubtless supposed, the owner of the fee, on March 25, 1857, he conveyed the premises described, with the usual warranty, to one Joseph W. Doby, who, in 1863, conveyed them to James R. Read; and he (1873) to Martha C. Jennings; and she (1876) to E. D. Durham; and he (1876) to Thomas J. Ancrum; and he (1881) conveyed the same to William A. Ancrum, trustee, with the exception of one-half acre, which was conveyed (1884) to Fannie C. Johnson; and William A. Ancrum, trustee, (1885) conveyed one acre of said premises to H. U. Parker. Fannie C. Johnson, being advised that she had good legal title, made improvements on the premises conveyed to her, which enhanced their value $1,450; and William A. Ancrum, trustee, supposing that his title was good, made improvements on the premises conveyed to him, which enhanced their value $2,000. William Alexander Ancrum died in the month of July, 1862, leaving at the time of his death as his lawful issue his son, Thomas A. Ancrum, and four daughters, viz., Mary, who intermarried with C. J. Shannon; Elizabeth B., who intermarried with Samuel Boykin; Ellen, who intermarried with Francis D. Lee; and Margaret, who intermarried with Samuel F. Boykin. Elizabeth was born April 25, 1843, and Margaret was born on May 6, 1848, and died April 28, 1884, leaving as her heirs at law her husband, Samuel F. Boykin, and four minor children, viz., Douglass A., Samuel F., Mattie R., and William A. Boykin. In 1872, while James R. Read held the premises, Thomas J. Ancrum, Mary A. Shannon, and Ellen D. Lee, three of the children of William Alexander Ancrum, by their deed under seal, released and relinquished all right or claim in said premises sold by their father. Julia Glass, the widow of the testator, died in 1885; and Elizabeth B. Boykin and the husband and children of her deceased sister Margaret Boykin, (being the two children of William A. Ancrum, who did not release their interest in the premises,) instituted this action, some time in the latter part of the year 1885, (the exact date does not appear,) against the several parties in possession, to recover their respective shares of the aforesaid premises, as purchasers under the will of William Ancrum, and to partition the same among themselves. The defendants claim that, the first son, Fowler Brisbane Ancrum, being out of the question, the devise gave a vested fee conditional to William A. Ancrum, and, having aliened the premises after issue born, his alienees are seized in fee; and, failing in this construction, that they had acquired title by the statute of limitations and presumption of a grant from lapse of time, etc. The issues of fact and of law were referred to the master, J. D. Dunlap, Esq., who made a very full and clear statement of the facts, as herein summarized, and held that William A. Ancrum took under his father's will only a life-estate in remainder after the life-estate of his mother Julia, and that his children and grandchildren (whose parent was dead) took by purchase as remainder-men, and not as heirs by limitation; and that Elizabeth B. Boykin and the heirs of her deceased sister Margaret Boykin are entitled to recover their shares of the premises in question,—the said Elizabeth B. one-fifth part thereof, and the other plaintiffs (heirs of Margaret) another one-fifth part.—and all proper rents, and allowing credits for improvements accordingly, etc. This report was heard upon exceptions by his honor, Judge Norton, who confirmed the report as to the construction of the will of William Ancrum; but he held that,

upon the purchase of his mother's (Julia's) life-estate by William Alexander Ancrum, that estate was merged in his own life-estate; and as that ended with his death, in July, 1862, a right of action then accrued to the remainder-men, who were under no disability to sue; and that the lapse of 20 years from that time until the action was brought raised the presumption of a grant from Mrs. Elizabeth B. Boykin, and, as to her, he dismissed the complaint; but he decreed that Samuel F. Boykin, the husband of Margaret, who had died, was entitled to one-fifteenth, and each of her four minor children to one-thirteenth, of the premises claimed. From this decree both the plaintiffs and defendants appeal to this court; the defendants upon the single ground that "his honor erred in adjudging that, under the will of William Ancrum, the children of William A. Ancrum took, as purchasers, an estate in fee-simple in remainder in the premises described, and that William A. Ancrum took only a life-estate therein." The plaintiffs' exceptions: "(1) Because his honor erred in holding that, when W. A. Ancrum purchased the life-estate of Mrs. Julia Glass in the premises described in the complaint, her life-estate merged in the life-estate of the said W. A. Ancrum. (2) Because his honor erred in holding that the presumption of a grant was set in motion against the plaintiffs at the time of the death of W. A. Ancrum. (3) Because his honor erred in holding that the occupancy of the premises since the death of W. A. Ancrum has created a complete presumption that Mrs. Elizabeth B. Boykin had conveyed her interest in the premises to the alienee of W. A. Ancrum. (4) Because his honor erred in not holding that the presumption arising from an adverse holding ceased to operate from the time of J. R. Read's purchasing the interests of certain co-tenants of the plaintiffs on the ——— day of ———, 1872, and from that time became permissive and amicable. (5) Because his honor erred in holding that the defendants are entitled to interest on the amount allowed them for improvements from the day of filing of said decree, when the evidence shows that they are in possession of said premises, and receiving the benefits of the same."

As to the construction of the devise: "To my second son, William Alexander Ancrum, for and during the term of his natural life; and from and after his decease to his lawful issue, absolutely and in fee-simple; but if my said second son, William Alexander Ancrum, should die, leaving no lawful issue at the time of his decease, then and in such case over," etc. Without going again into the authorities upon the subject, we think this case is concluded by that of McIntyre v. McIntyre, 16 S. C. 294, where the authorities are cited and the conclusion satisfactorily stated by Mr. Justice McIver as follows: "We think the authorities in this state conclusively show that where the word 'issue' is so qualified by additional words as to evince an intention that it is not to be taken as descriptive of an indefinite line of descent, but is used to indicate a new stock of inheritance, the rule in Shelley's Case does not apply." In that case, as in this, the antecedent estate was expressly "for life," and, after the decease of the tenant for life, to the "issue." The superadded words there were, "and their heirs forever," while here they are, "absolutely and in fee-simple,"—an equivalent phrase certainly quite as strong as the other. Besides, here there is still another limitation over to the third son, Thomas James Ancrum: "But if my said second son, William A. Ancrum, should die, leaving no lawful issue at the time of his decease," etc. We agree with the master and circuit judge that William Alexander Ancrum took only a life-estate in the premises described, and that there was a limitation over to his issue as purchasers.

Then as to the plaintiffs' exceptions. The first charges that it was error in the judge to hold "that, when W. A. Ancrum purchased the life-estate of Mrs. Julia Glass in the premises described, her life-estate merged in the life-estate of W. A. Ancrum." It was certainly just when Chancellor Kent adopted the language of a great master in the doctrine of merger, "that the learning under this head is involved in much intricacy and confusion." "Merger is described as the annihilation of one estate in another. It takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged—that is, sunk or drowned—in the greater." Garland v. Pamplin, 32 Grat. 305; 2 Bl. Comm. 177; 4 Kent, Comm. 100. Taking this definition, do the conditions exist here for a merger? Mrs. Glass had an estate for life, and (passing over the eldest son, who had died early) the next vested estate was that of William Alexander Ancrum, which was also for life, without any estate intervening. These respective estates were to be enjoyed successively and not concurrently; that of the mother, Julia, coming first in the order of succession. But in 1837 W. A. Ancrum purchased the life-estate of Julia, and held both, claiming the premises as his own absolutely, until he sold and conveyed them to Doby, in 1857. Did not this make the case referred to in the books "of the incompatibility of a person filling at the same time the characters of tenant and remainder in one and the same estate?" It is said, however, that both estates were for life, and therefore equal in degree, and merger only takes place when a larger and smaller estate meet in the same person. The general rule is that equal estates will not drown in each other, but there are well-established exceptions. Were these estates equal in the sense of the rule? Looking at them from the point of view of W. A. Ancrum, one was an estate for the life of Mrs. Julia Glass, preceding his estate, and the other succeeding was for his own life. There seems to be something in the order in which the estates stand to each other in the matter of time. Chancellor Kent states the rule thus: "The merger is produced either

from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person. An estate for years may merge in an estate in fee or for life; and an estate pour autre vie may merge in an estate for one's own life; and an estate for years may merge in another estate or term for years, in remainder or reversion. * * * To effect the operation of merger, the more remote estate must be the next vested estate in remainder or reversion, without any intervening estate, either vested or contingent; and the estate in reversion or remainder must be at least as large as the preceding estate." It seems that, even when the estates are theoretically equal, the first in the order of succession may merge in the next vested remainder, being in this respect somewhat like a surrender, which is the relinquishment of a particular estate in favor of the tenant of the next vested estate in remainder or reversion. In the notes to the case of James v. Morey, 2 Cow. 246, 3 Shar. & B. Lead. Cas. 231, (lately published, 1887,) the rule is thus stated: "The estate in reversion or remainder must be as large as, or larger than, the estate to be merged. 3 Prest. Conv. 51. The expression 'as large or larger' must be, of course, taken in the technical sense. Thus an estate for life is larger than an estate for years, although death may destroy the former estate long before the efflux of time has brought the latter to a conclusion. Thus if a lease be made for years, with a remainder to the lessee for life, the estate for years will merge; but if there be an estate for life, with remainder to the life-tenant for years, there will be no merger. Co. Litt. 54b. In Sheehan v. Hamilton, 4 Abb. Dec. 211, it is said that estates of equal degree do not merge; but, whether this be strictly so or not, the effect of a merger will be produced by the unity of possession. An estate at will will merge in an estate for years. 3 Prest. Conv. 176. Estates for years may merge in each other or in estates for life; estates for life will merge. Co. Litt. 338b; Cary v. Warner, 63 Me. 571; Allen v. Anderson, 44 Ind. 395." We cannot say that the circuit judge committed error in holding that, when W. A. Ancrum purchased the life-estate of Mrs. Glass in the premises, that estate merged in his estate.

Exceptions 2, 3, and 4 make the point, substantially, that the judge erred in holding that at the death of William A. Ancrum (1862) the rights of the issue in remainder attached, and from that time the possession of the parties was adverse, so as to put in motion the presumption of a grant from Mrs. Elizabeth B. Boykin, who reached her majority in 1864, two years after the death of her father, W. A. Ancrum, and more than 20 years before the commencement of the action. The life-estate of Mrs. Glass was the first in the order of succession, and doubtless was expected to be the first to fall in; the fact, however, was otherwise, for she survived W. A. Ancrum for more than 20 years. It is true that, but for his purchase of her estate, W. A. Ancrum would never have reached the possession of his estate; and it is asked whether, under these circumstances, his right must be limited to his own life-estate, which, though vested, he never enjoyed in possession, so as to make his death and not hers, the time at which an action accrued to the remainder-men. At first view it is not obvious how an estate which turned out to be the longest could be drowned in one of shorter duration; but, according to the authorities, it seems that such was the necessary consequence of the merger. See Mangum v. Piester, 16 S. C. 330; 4 Kent, Comm. 99; 2 Pom. Eq. Jur. § 787, and notes, where it is said that "an estate for years will merge in a reversionary term of years, even though the latter is of less duration," citing among other authorities Welsh v. Phillips, 54 Ala. 309. And Chancellor Kent says: "The estate in which the merger takes place is not enlarged by the accession of the preceding estate; and the greater or only subsisting estate continues after the merger precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished," etc. We cannot doubt that the premises were held adversely to all the world. During his life William A. Ancrum held them as his own absolutely. Shortly before his death (in 1857) he conveyed them to Joseph W. Doby, with the usual warranty of title. We do not see how the relinquishment of some of the remainder-men could affect the character of the possession as to those who did not relinquish. We do not, however, think that the defendants should have interest on the value of their improvements while they have the possession and use of the same.

The judgment of this court is that the judgment of the circuit court, with the slight modification as to interest on the value of the improvements, be affirmed.

SIMPSON, C. J., and McIVER, J., concur.

MERRITT v. SCOTT et ux.

(81 N. C. 385.)

Supreme Court of North Carolina. June Term, 1879.

H. R. Bryan, A. G. Hubbard, W. E. Clarke, and F. M. Simmons, for plaintiff. Green & Stevenson, for defendant.

SMITH, C. J. The tract of land described in the complaint was in 1842 conveyed by James Merritt, the owner, to his son John Merritt, in trust for another son, Francis Merritt, for life, remainder to his wife, Deborah, for life or widowhood, and with a further limitation over at her death or marriage to the children of Francis then living. John Merritt, the trustee, died intestate, leaving children, who, with the said Deborah, are the plaintiffs in this action. The life tenant Francis, who is also dead, in his lifetime conveyed his estate to one John Cox, and after his death his administrator, under proceedings in the probate court and with license therefor, sold and conveyed the land to the defendant Edward Scott. The object of the suit is to recover the land for the use of said Deborah, and damages for its detention since the death of Francis Merritt.

No issue as to title is made, and in the inquiry before the jury as to the damages, the defendant offered to show in support of the defence set up in his answer, that valuable improvements had been made on the lands both by himself and the preceding occupant, in the erection of useful buildings, and by ditching, fencing, and manuring, whereby the value of the land had been greatly enhanced. The evidence on objection from plaintiff was excluded, and the exception to this ruling of the court is the only point presented in the appeal.

Under instructions, the jury assessed the damages from August 18th, 1873, which we suppose to be the date of the determination of the first life estate, at the rate of one hundred dollars per annum. Whether these improvements or any of them were made during the years for which the defendant is charged for rent, does not appear.

We think it clear that improvements of any kind put upon land by a life tenant during his occupancy, constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state, without deduction for its increased value by reason of good management, or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority.

For subsequent rents and uses he is entitled to have the amount reduced by those improvements. Suppose, while holding over, the defendant had by such improvements as in the answer are alleged to have been made, rendered the land more valuable, as it comes to the remainderman, would it not be reasonable he should pay a smaller rent than if nothing of the kind had been done? So if no repairs were made and the buildings had gone to decay, and by mismanagement and bad cultivation, the farm had been abused and its value impaired, a full and larger rent might justly be required of the tenant.

The evidence of such improvements as were made by the defendant, after his estate expired, and he became chargeable with rent, ought to have been admitted and considered by the jury in measuring the value of the rent, and in mitigation of damages. The evidence was competent for this purpose only, and not, in case the improvements were worth more than the rents, to constitute a counterclaim for the excess.

The rule is thus stated by Mr. Tyler: "The defendant should be allowed for the value of his improvements made in good faith, to the extent of the rents and profits claimed, and this is the view of the subject which is supported by the authorities." Tyler, Ej. 849.

Referring to the action for mesne profits which might be brought after a recovery in ejectment, Ruffin, C. J., uses this language: "The jury can then make fair allowance out of the rents, and to their extent, for permanent improvements honestly made by the defendant, and actually enjoyed by the plaintiff, taking into consideration all the circumstances." Dowd v. Faucett, 4 Dev. 92.

Thus far the jury should have been allowed to hear and consider the evidence, in assessing the sum which the defendant should pay for the use of the premises, for it is quite apparent the improvements were made in good faith and will enure to the plaintiff's benefit.

As a counterclaim and to charge the land therewith when the estate in remainder is vested in Deborah, the evidence is totally inadmissible under the act of February 8, 1872. Battle's Revisal, c. 17, § 262a et seq. The act is not applicable to a case like this, but to independent and adversary claims of title, and was intended to introduce a just and reasonable rule in regard to them.

The owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession; and if it has been enhanced in value by improvements made under the belief that he was the owner, the increased value he ought not to take without some compensation to the other. This obvious equity is established by the act. But to enjoy its benefits, a party after judgment must file his petition and ask to be allowed for his permanent improvements, "over and above the value of the use and occupation of such land."

If the court is satisfied of the probable truth of the allegation, and the case is one to which the statute applies, and this must be preliminarily determined, it may suspend execution, and cause a jury to be impaneled "to assess the damages of the plaintiff and the allowance to the defendant" for his permanent improvements, "over and above the value of the use and occupation of the land."

This course has not been pursued, and the evidence is offered in the trial without any previous application to the judge, or his assent being obtained. But waiving the informality, we are not prepared to say the judge was in error in disallowing the evidence for the purpose of establishing a counterclaim for the excess. The defendant is entitled to have his claim for improvements made since the expiration of his own estate, considered by the jury in estimating the value of the rents, under appropriate instructions from the court in relation thereto. For this error in wholly rejecting the evidence, there must be a venire de novo, and it is so ordered.

Error. Venire de novo.

WATKINS v. GREEN.

(60 N. W. 44, 101 Mich. 493.)

Supreme Court of Michigan. Sept. 25, 1894.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by Gilbert Watkins against Nelson Green for breach of covenant of warranty. Judgment for defendant, and plaintiff appeals. Reversed.

The defendant executed to plaintiff a warranty deed of certain lands. This action is brought to recover for alleged breaches of the covenant of warranty. The title to the property was originally in one Toussaint L'Esperance, who died intestate in 1842, leaving a widow and six children. He bequeathed one-third of the land in fee to his widow, and a life estate in the remainder. Upon the termination of the life estate the two-thirds were bequeathed in equal shares to his six children. Prior to 1853 the land had been unoccupied, except that the timber had been removed. In October, 1850, the entire land was sold for the taxes of 1848, and was again sold in October, 1851, for the taxes of 1849. October 21, 1851, the auditor general issued his deed to Edward Meyers upon the first sale, and on November 16, 1852, a second deed upon the sale of 1851. The first sale was to one Williams, who assigned to Meyers. The second sale was direct to Meyers. Two of the children died, leaving no issue. One is dead, leaving one child, and three are still living. The widow died May 2, 1887. July 19, 1851, Meyers obtained by quitclaim deed the interest of Edward, one of the six children, who was the owner of an undivided one-ninth. May 23, 1854, the widow and two of the children quitclaimed their interests to one Nathan H. White, who, on July 1st of the same year, conveyed the land by quitclaim deed to one Daniel Ball. Ball deeded to one Boltwood in 1857. June 4, 1858, the interests of two of the other children passed by guardian's deed to one Dow, who in turn conveyed these interests to Boltwood. October 3, 1853, the entire land was sold for the taxes of 1851 and 1852. Two deeds were issued upon these sales to one Stevens, who on July 2, 1855, conveyed the interest acquired by these deeds to Ball. Ball conveyed to White, and the tax titles passed to Boltwood under the deed from White already referred to. May 17, 1887, Boltwood conveyed to James B. Judson. In 1886 Judson purchased the interest of the two remaining heirs of Toussaint L'Esperance. There is no competent evidence that Meyers ever went into possession of the land, or was intrusted with its care and supervision, either by L'Esperance or his widow. The only testimony upon this subject is given by one of the children of L'Esperance, who testified to his understanding from conversations he had with his mother. Such testimony was hearsay and incompetent. July 4, 1853, Meyers conveyed the entire land to one John Hanley by warranty deed. The land was then in the state of nature, except that the timber had been removed, and was covered with water and willows. Hanley immediately went into possession with his family, drained and fenced it, and the following year built a house, barn, and other buildings upon it, and continued in such possession until he conveyed by warranty deed to defendant, Green, October 13, 1879; meanwhile paying the taxes and cultivating and improving the land. Green executed a warranty deed to plaintiff, Watkins, January 2, 1881. Green occupied the land, through tenants, until the conveyance to plaintiff. Mr. Judson commenced an action of ejectment against the plaintiff, who notified defendant of Judson's claim, and demanded that he defend the suit. This defendant refused, claiming that he had a good title by adverse possession. Plaintiff then purchased the interests held by Judson, and brought this suit. The court below directed a verdict for the defendant, holding: "(1) That John Hanley went into possession of the property in dispute under a claim of title, i. e. the Meyers tax deeds and his deed from Meyers, and that under this claim he held an open, notorious, hostile, distinct, and adverse possession for over twenty years. (2) That, of the 'patent title,' defendant obtained one-ninth by his deed from Meyers. (3) That the statute of limitations had run in favor of Hanley and his successors, against the widow, as to the three-ninths willed to the widow absolutely. (4) That there was a merger of the life estate and the three-ninths of the estate obtained from Enos, Philip, and Charles, and passing to Boltwood on June 12, 1869, and that the statute of limitations had run against the three-ninths, in favor of Hanley and his successors. (5) That the Sears Stevens tax titles were paramount titles, and, when purchased by Ball, extinguished the two-ninths of the patent title still held by Elizabeth Crouch and Josephine Page, and the right of entry accrued at once to Boltwood, and that the statute of limitations had run against the entire patent title, in favor of Hanley and his successors. (6) That the tax titles purchased by Meyers were paramount to the title of the children and that of the widow, and that Hanley's possession under the paramount title extinguished the title of the widow and children to the property in question."

George W. Radford (Edward A. Barnes, of counsel), for appellant. Jay Fuller, for appellee.

GRANT, J. (after stating the facts). Meyers, at the time of the purchase of his one-ninth interest from Edward L'Esperance, was not in possession, nor did he take possession either under that deed or his tax deeds. He occupied no relation of trust or confidence towards the widow and the heirs. He was therefore under no obligation to pay their taxes, or to buy up outstanding interests or

titles for their benefit. Hanley went into possession under his warranty deed from Meyers, claiming the entire title, and under a deed which purported to convey the entire and absolute fee. It cannot be said that he accepted this deed charged with any duty to protect the life estate, or the undivided interests of any of the tenants in common. Hanley's possession at once became open, notorious, hostile, and exclusive to all claiming any interest in the land. That possession continued in Hanley and his grantees for nearly 40 years, and more than 20 years after the minor children became of age. It is established in this state that one who purchases an undivided interest in lands, and enters as a stranger to the rights of his cotenant, is not estopped from setting up against them an adverse title that originated before his purchase. Blackwood v. Van Vleit, 30 Mich. 118; Campau v. Dubois, 39 Mich. 274; Sands v. Davis, 40 Mich. 14.

Such entry operated as an ouster of all those having an interest in the land and the right of entry. The widow was then entitled to the possession of one-third by virtue of her one-third ownership, and to the possession and enjoyment of the other two-thirds by virtue of her life estate. Clearly, therefore, her acts, and those of her grantee of these two interests, were lost by adverse possession, and the title vested in the defendant.

When Ball purchased the interest of the widow and one of the children, and the tax titles for the taxes of 1851 and 1852, which were then outstanding, all these titles became merged in him. He was then entitled to possession, as against Hanley. The right of entry became complete, and the statute of limitations began to run. By the deed from Ball to White, dated in 1856, and from White to Boltwood, in 1857, Boltwood succeeded to the same rights and interests, and was entitled to possession. Boltwood, by his purchase of the interests of Enos and Philip in 1858, became possessed of the entire title, including the life estate, except the one-ninth purchased by Meyers and the two-ninths outstanding in Josephine and Elizabeth. He took no steps to enforce his rights, and the defendant, by the adverse possession of himself and his grantors, obtained title to all the interests owned by Boltwood. Boltwood, being the owner of the life estate, was obligated to pay the taxes, and protect the interests of the remainder-men. If he chose to permit Hanley and his grantees to remain in adverse and undisturbed possession till such possession ripened into a valid title, neither he nor his grantees can now separate his interests, under the plea that, as to some of the interests, he had not the right of entry.

Josephine and Elizabeth, or their grantees, acquired no right of entry until the death of their mother, in May, 1887, when the life estate terminated. How. St. § 8700. As to these interests, therefore, there has been no adverse holding, so as to convey title. Cook v. Knowles, 38 Mich. 316; Marble v. Price, 54 Mich. 466, 20 N. W. 531.

If, therefore, the tax deeds to Meyers are void, there was a breach of the defendant's covenants of warranty, for which the plaintiff is entitled to damages. Of course, if the tax deeds obtained by Meyers are valid, they cut off the entire title of the widow and heirs. Where the owner of the life estate neglects to pay the taxes assessed upon the land, and they are sold under valid taxes and valid proceedings, title passes to the grantee, and the only remedy of the remainder-men is against the life owner. Judgment must be reversed, and a new trial ordered. The other justices concurred.

WOOSTER v. COOPER et al.

(33 Atl. 1050, 53 N. J. Eq. 682.)

Court of Errors and Appeals of New Jersey. March 9, 1896.

Appeal from court of chancery.

Suit by Charles I. Wooster against William T. Cooper and others. Decree for defendants, and plaintiff appeals. Affirmed.

John W. Wescott and John J. Crandall, for appellant. William Moore and James Buchanan, for respondents.

GUMMERE, J. Benjamin D. Cooper died in the month of March, 1893, having made his last will on December 31, 1881, by which, among other things, he provided as follows: "I order and direct that all my estate, real, personal, and mixed, shall during the life of my beloved wife, Tacy Cooper, should she survive me, pass into her hands, and be subject to her sole management and control, to keep and use or sell and dispose of the same as she shall see fit; and my executors hereinafter named shall not, during said time, be responsible therefor. From and after the death of my wife, should she survive me, otherwise from and after my death, all my estate, real, personal, and mixed, which shall then remain, I order and direct my executors hereinafter named, or the survivor of them, to dispose of, as soon as conveniently may be thereafter, as follows." The will then directs a conversion of the estate into cash, and the distribution thereof among the respondents in this case. Testator's wife, Tacy, survived him, and, under the terms of his will, took possession and control of his entire estate, real and personal, and continued to possess and enjoy the same until her death, which occurred February 24, 1894. Testator's wife made no disposition of any portion of her husband's estate during her lifetime, but she left a will in and by which, after directing the payment of her debts and funeral expenses, she gave, bequeathed, and devised all her property, both real and personal, wherever situate and whatever the same might be, to her nephew Charles I. Wooster, the appellant in this case, to him and his heirs, forever. Under this last-mentioned will, the appellant claims to be entitled to the whole of the estate of Benjamin D. Cooper which was in the possession of his wife, Tacy, at her death; his insistment being that she was the absolute owner thereof by the terms of her husband's will, because there was coupled with the devise to her an absolute and unqualified power to dispose of the estate. The vice chancellor, by the decree appealed from, overruled this claim, and held that, by the will of her husband, Tacy Cooper took only a life interest in his estate, and that at her death so much of it as had not been disposed of by her in her lifetime went to her husband's legatees.

I agree with the learned vice chancellor in this construction of the will of Benjamin D. Cooper. It gives to his wife, by express words, a life estate in his property, and then annexes to it a power to dispose of the same without qualification or limitation. The rule that a devise of an estate generally, with a power to dispose of the same absolutely and without limitation, imports such dominion over the property that an estate in fee is created, and that a devise over is consequently void, has one exception, which is this: that where the testator gives an estate for life only, by certain and express words, and annexes to it a power of disposal, the devisee for life will not take an estate in fee. This exception was recognized and enforced by this court in the case of Downey v. Borden, 36 N. J. Law, 460, and again in the case of Pratt v. Douglas, 38 N. J. Eq. 533; and in the latter case it was declared to apply to bequests of personal estate as well as to devises of realty. These cases have definitely settled the law on this subject in New Jersey, and the propriety of the rule laid down in them is no longer open to discussion. The decree of the court of chancery should be affirmed.

FOSTER v. HILLIARD et al.

(Fed. Cas. No. 4,972, 1 Story, 77.)

Circuit Court, D. Massachusetts. May Term, 1840.

Mr. Dehon, for plaintiff. S. Greenleaf, for defendants.

STORY, Circuit Justice. The case may be shortly stated, upon which the arguments have been addressed to the court. A devise was made of certain wild and uncultivated land in Maine to A., as tenant for life, remainder to his nephews, who were minors, in fee. After the death of the testator, the tenant for life, with the assent of the guardian of the minors, sold the land, and received a part of the purchase money, and then died, and the residue of the purchase money has since been received by the executors of the tenant for life. The minors have since come of age; they do not seek to disturb the sale; but they claim the whole purchase money from the executors. The present action is brought by one of the remainder men, to recover his share. There is no proof of any agreement between the tenant for life and the guardian, as to the distribution or division of the purchase money between the tenant for life and the remainder men. On behalf of the remainder men, it is contended: (1) That the purchase money is to be treated as a mere substitute for the land on the sale; that the tenant for life was entitled to the income thereof during his life; and that the whole principal now belongs to them. (2) That if they are not so entitled, the apportionment of the purchase money is to be made between them and the executors, not according to the value of the life estate of the tenant for life, according to the common annuity and life tables, but according to the actual facts, he having died shortly after the sale. On the other hand, the executors contend: (1) That the tenant for life was entitled, and they, as his executors, are entitled, to hold so much of the purchase money as the value of his life estate, at the time of the sale, bore to the whole interest in fee. (2) That the apportionment between them is to be made according to the value calculated by the common annuity and life tables, at the time of the sale, without any reference to the actual duration of his life. It is admitted, that there is no case exactly in point; and, perhaps, considering the frequency of sales by a tenant for life and a remainder man, it is a matter of some surprise, that no such case should be found. The circumstance, however, may be reasonably accounted for, either upon the ground, that the sale usually takes place upon distinct and independent bargains; or, where there is a joint bargain, the shares of the respective parties are usually ascertained and apportioned by some private agreement Here, no such agreement can be traced; and the sale seems to have proceeded upon a mutual confidence, that the proceeds would ultimately be divided justly and equitably between the parties, according to their respective rights. What are those rights? It seems to me, that when a sale of real estate is jointly made by two or more persons, having independent interests, the natural, nay, the necessary conclusion, in the absence of all other countervailing circumstances, is, that they are to share the purchase money according to their respective interests. If three tenants in common should jointly sell an estate, they would certainly be entitled to share the purchase money according to their respective undivided interests. If one held a moiety, and the others one quarter part each, they would share in the like proportions. So, if three parceners should sell an estate, they would all share equally in the purchase money. What difference can it make, whether they have undivided interests in the fee, or separate interests, carved in succession out of the fee? Whether they are tenants in common of the fee, or tenants for life, and remainder men in fee? In contemplation of law, in each case, the sale is a sale of distinct and independent interests; and if the parties do not fix the amount of their respective shares in the purchase money by some positive agreement, the natural conclusion is, not that any one of them surrenders his right to the other, but that they silently agree to apportion the same among themselves according to their respective rights. Now, if in the present case, the tenant for life had separately sold his life estate to the purchaser, there is no pretence to say, that he would not have been solely entitled to the principal of the purchase money. What difference can it make, except as to the means of ascertaining the value of his life estate, that he proceeds to make sale, or joins in a sale of the remainder in fee? It does not strike me, that there is any. Suppose A. and B., the several owners of two adjoining acres of land, should unite and sell them both in one deed, to a purchaser for a gross consideration; would not the purchase money be divisible between them according to the relative value of the two acres? I think it clearly would.

But it is said, that, upon the sale, the purchase money was substituted for the land, and it is therefore to be treated exactly, as if the land had remained in the parties; and hence, that the tenant for life had an interest for life in the purchase money, that is in its income, and, subject thereto, that the whole purchase money belonged to the remainder men, the present claimants. Now, this is assuming the very point in controversy; it is stating the difficulty, and not solving it. When a sale is made, the ordinary result is, that the vendor is entitled to the purchase money itself, and not merely to the income thereof. If a different appropriation takes place, it is a matter of private agreement, and not an inference of law. If (as I have already suggested) a tenant for life of land sells his life estate, he has a title to the whole purchase money, and not merely to the income thereof. He sells his own estate, and

he is entitled to its full value at the time of the sale. Then, how stands the law in cases, bearing a close analogy. Suppose the case of a tenant for life, remainder in fee, of lands under mortgage, in what manner do the parties contribute to the discharge of the incumbrance? Exactly, as we all know, according to the relative value of their respective interests in the land, calculated according to the value of the estate of the tenant for life, by the common tables. I need not cite authorities to this point; they are familiar to the profession. See 1 Story, Eq. Jur. § 487, where many of the authorities are collected; 1 Pow. Mortg. (by Coventry & Rand) 312, note M; Id. 314, in note Q.; 3 Pow. Mortg. (by the same) 920, 923, note II; Id. 1043, note O. The rule is founded upon the obvious equity, that every one of the parties in interest shall contribute in proportion to the benefit, which he derives from the discharge of the incumbrance. The same principle applies to the case of a sale. Each party is to participate in the purchase money, in proportion to the beneficial interest he has in the land. The same principle applies, where a mortgagee devises the mortgaged estate to one for life, remainder over in fee; the tenant for life and the remainder man share the mortgage money, if paid by the mortgagor during their lives, according to the value of their respective interests at the time of the payment. See 1 Story, Eq. Jur. § 485, and note; 3 Pow. Mortg. (by Coventry & Rand) 1043, note O. This was indirectly admitted in Brent v. Best, 1 Vern. 69; and directly held in Thynn v. Duvall, 2 Vern. 117. That is certainly a case nearly approaching the present, where it might have been said, that the devisee for life of the mortgagee ought to be entitled only to the interest for life, and to no part of the principal. A doctrine somewhat different was asserted in the case of Lord Penrhyn v. Hughes, 5 Ves. 99, 107, where the master of the rolls said, that where there is a tenant for life and remainder men, entitled to an estate under incumbrances, the tenant for life and the incumbrancers have a right to have the estate sold to discharge the incumbrances, and the surplus of money, after discharging the incumbrances, is to be divided between the parties, in the proportion, that their interests bear to the estate; that is, as the master of the rolls afterwards explained, by putting the whole out at interest, and allowing the tenant the interest for his life. See White v. White, 9 Ves. 554, 4 Ves. 33; 3 Pow. Mortg. 1043, note O. It is not, perhaps, very easy to see the reason of this particular doctrine. It may be, that the tenant for life shall not, by his own act, compel the remainder men to submit to a sale, by which his interest in the remainder may be materially affected without his consent. But that case is unlike the present, where there is a voluntary joinder in the sale, or a confirmation of it. A court of equity may well decline to interfere in adversum to change real estate, by a sale, into personal estate, without imposing conditions, by which the proceeds shall retain throughout the character of the original fund, when it might not act in the same manner, where there had been a voluntary sale by the parties. The distinction is often acted on in courts of equity. See Story, Eq. Jur. § 1357. In the case of Houghton v. Hapgood, 13 Pick. 154, as far as I am able to gather from the report, (which, on this point, may be thought somewhat indeterminate,) a tenant by the curtesy of his wife's estate, which was sold by an executor improperly, but the sale was afterwards confirmed both by himself and by her heirs, was held entitled to share in the proceeds according to the value of his life estate, as tenant by the curtesy, calculated by the common tables of life annuities. If I take a right view of that case, it is in exact coincidence with the opinion, which I hold in the present case.

It appears to me, that the sale in the present case, having been confirmed and adopted by all the parties in interest, must be treated in the same way and manner, and have the same effect, as if it had been originally made by the consent of all the parties in interest, and all of them were then competent to make the sale; and that the rights of all the parties were fixed at that time. And this leads me to say a few words on the second point, made at the bar, as to the rule of apportionment. I think it must be according to the value of the life of the tenant for life at the time of the sale, calculated according to the common tables. If I am right in the opinion already stated, that the rights of the parties were absolutely fixed at the very time of the sale, then it follows, as a necessary consequence, that they are entitled to share in the proceeds according to the relative values of their respective interests in the estate at the time of the sale. The case of Clyat v. Batteson, 1 Vern. 404, is not opposed to this doctrine. In that case lands in mortgage were devised to A. for life, remainder to B. in fee. B. bought up the mortgage, taking an assignment thereof in the name of trustees. A. died; and then B., the remainder man, brought a suit against the defendant, who was the representative of A., to redeem the mortgage, and insisted, that the representative ought to pay one third of the mortgage money, paid by B., by reason, that A. enjoyed the profits during his life. The court held, that if B. had brought the bill in A.'s lifetime, he would have been entitled to the proportion of the money according to the value of the respective estates of the tenant for life and the remainder man (that is, according to the old rule, now exploded, to one third); but that A. being dead, and having enjoyed the estate but one year only, the representative was bound only to allow for the time A. enjoyed the estate. This decision turned, therefore, upon the very point of the value of the estates of the tenant for life and the remainder man at the time, when the parties were charged with the payment of

the money. But when the tenant for life sells his life estate, he sells it for what it is then worth, and of course his share of the purchase money does not depend upon the future event of his life or death, but upon its present value. It strikes me, therefore, that the true rule in the present case is to apportion the purchase money between the tenant for life and the remainder men, according to the relative values of their respective estates in the land at the time of the sale, unaffected by the subsequent events. It is said, that the duration of the life of the tenant for life, calculated according to the common tables, was over twenty years, whereas he died in a little less than four years after the sale. Be it so. The event has turned out unfavorably for the remainder men,—as contingent events sometimes do. But the tenant for life might have lived thirty years, and then the apportionment would have been favorable to them. The fact, therefore, does not shake the propriety of the rule of apportionment; but it only shows, that it has the common elements of uncertainty belonging to all calculations of contingencies. A tenant for life of a mortgaged estate may die within a year after he has been compelled to pay one third part of the mortgage money upon a decree for redemption, his life having been calculated as worth that proportion of the money. He may, on the other hand, live far beyond the period of average life. Yet this inequality has never been supposed to justify any departure from the general rule of contribution.

In the view, which I take of the case, the other points made at the bar are not material to be discussed. I think, that the remainder men are entitled to their proportion of the purchase money, according to the relative value of the life estate, and the remainder at the time of the sale; that the executors are liable for this amount to the remainder men, and that, upon so much of the money as either the tenant for life or the executors have received interest, they are entitled to receive their proportionate share of the interest.

MOSHER et al. v. YOST et al.

(33 Barb. 277.)

Supreme Court of New York, General Term. Jan. 1, 1861.

Action for the recovery of certain real estate and for damages for withholding the same. The answer was a general denial. Plaintiff gave in evidence a lease and divers assignments vesting the title in one James Mantany, who died in 1857, in possession of the premises. Deceased left a will, which was never admitted to probate, but was declared invalid by the surrogate. Letters of administration were issued. A son, after the death of his father, claimed to be the owner of his farm by gift from the father, and sold his interest therein to defendant's assignee, at the same time transferring the lease to them. Plaintiffs claimed under the assignment of a lease from the administratrix of the decedent. The defendants took possession. Judgment was rendered for the plaintiffs for possession of the property and for mesne profits. The defendants appeal.

Before ROSEKRANS, POTTER, and BOCKES, Justices.

W. Higbie and H. Link, for appellants. Hardin & Burrows, for respondents.

ROSEKRANS, J. We need not discuss the question whether the instrument signed by Lois Mantany, in form, passed to the plaintiff the title to the land and lease under which the farm was held, the possession of which is the subject of this action. Conceding that it did, the deed of Mrs. Mantany was clearly void upon the ground that the premises in question were, at the date of that deed, in the actual possession of the defendants claiming title under an assignment of the lease from William Mantany. The estate of the original lessees was a freehold estate, it being for their lives. 1 Rev. St. p. 722, § 5. These lessees were still in life. By the assignment or conveyance of that lease the assignee or grantee became the owner of the lands, and held an estate during the life of another. This was the nature of the estate which James Mantany held at the time of his death. The statute declares that it was a freehold estate during his life, but that after his death it became a chattel real. 1 Rev. St. p. 723, § 6. This estate passed as assets to the administrators of his estate. 2 Rev. St. p. 83, § 6. At common law, if a man had an estate granted to him (without naming his heirs) for the life of another, and died during the life of him by whose life it was holden, any one who could first enter on the land might lawfully retain it, so long as the cestui que vie lived, by right of occupancy. The land did not revert to the grantor, for he had parted with all his interest so long as the one by whose life it was holden lived; it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee and not of any particular estate carved out of it; and it did not belong to the grantee, for he was dead. It did not descend to the heirs of the grantee, for there were no words of inheritance in the grant; nor could it vest in his executors, for no executor could succeed to a freehold. And if an estate for the life of another was granted to a man and his heirs, and the grantee died, his heir might enter and hold possession, and was called a special occupant as having a special exclusive right, by the terms of the grant, to enter upon and hold the land. The heir was not regarded as taking by descent, and if sued upon the bond of his ancestor he could plead riens per descent, as these estates were not liable to the debt of the ancestor. To remedy these evils the statute of 29 Car. II. enacted that such estate pour autre vie should be devisable, and in case no devise thereof should be made, the same should be chargeable in the hands of the heir if it came to him by reason of a special occupancy as assets, by descent, as in case of lands in fee simple, and in case there was no special occupant thereof, it should go to the executors and administrators of the party who had the estate by virtue of the grant, and be assets in their hands for the payment of debts. 2 Bl. Comm. 258, etc., and notes; Williams, Ex'rs, 1–69; 4 Kent, Comm. 26. This statute was enacted in this state, leaving out the provision of the act of 29 Car. II. as to the special occupant. 1 Rev. Laws, p. 365, § 4. It directed that the estate, if not devised, should go to the executors and administrators of the party who had the estate, to be applied and distributed as part of the personal estate. The only object of these statutes was to prevent the land being taken by a special occupant who could not be made liable for the value of the land as heir, in payment of the debts of his ancestor, and to provide for the application of the estate to the payment of the debts of the one who held the estate, or the distribution of it amongst his next of kin. They did not destroy the estate, nor were they designed to have that effect. It is a maxim in law that an estate which once existed must continue to reside somewhere. It cannot be annihilated. Livingston v. Proseus, 2 Hill, 529. The latter part of the provision of the revised statute, (1 Rev. St. p. 722, § 6,) "that an estate during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real," could only have been adopted to characterize the estate for the purpose of passing it to the executor or administrator of the testator or intestate. Clearly it must have been intended that the whole estate should pass to such executors or administrators, and after it came to the executors or administrators it would still be an estate for the life of another, and so a freehold estate. In Doe ex dem. Blake

v. Luxton, 6 Term R. 291, Lord Kenyon says: "An estate per autre vie partakes somewhat of the nature of personal estate, though it is not a chattel interest. It still remains a freehold interest for many purposes, such as giving a qualification to vote for members of parliament, and kill game, and some others. A will to dispose of it must always be attested by these witnesses, under the statute of frauds." And in 3 Russ. 230, it was held that such an estate was a perfect freehold, even in the hands of the executors of the former owner of the estate. Chancellor Kent says, in 4 Kent, Comm. 27, such an estate "is a freehold interest sub modo, or for certain purposes, though in other respects it partakes of the nature of personal estate." In the hands of the grantee of the executor or administrator it was the same freehold estate. This was held in the case of Roseboom v. Van Vechten, 5 Denio, 424–426.. A freehold estate can only be conveyed by deed. 1 Rev. St. p. 738, § 137; Watk. Conv. 31. The referee finds, and concedes in his opinion, that at the date of the conveyance by Mrs. Mantany to the plaintiff, the defendants were in actual possession of the lands, claiming title under the assignment of the lease from William Mantany. The claim of the defendants, therefore, was of a freehold estate. To constitute an adverse possession it is not necessary that the title under which the party claims should be a good one, but simply that he should enter under color and claim of title exclusive of any other right. Roseboom v. Van Vechten, 5 Denio, 426; Livingston v. Peru Iron Co., 9 Wend. 517. The possession must be adverse to the one who is entitled to the possession. Clarke v. Hughes, 13 Barb. 147; Vrooman v. Shepherd, 14 Barb. 450, and authority cited. If a lessee for life or years be ousted of the land by a stranger, and after ouster and before his entry he surrenders to his lessor, it is not a good surrender, for he has but a right, at the time of the surrender. Perk. § 600. In the case cited last above, (14 Barb. 453,) Hand, J., says: "When the lessee for life is disseised, the rule in relation to surrenders prevails, and his conveyance is clearly void as a surrender." The same rule prevails as to a grant to any other person than the lessor. The learned referee seemed to think that the administrators of James Mantany could not have maintained ejectment against the grantees of William Mantany. In this he is clearly mistaken. They had an estate in the land, and were entitled to the possession; and this is all that is necessary to maintain ejectment. An executor may maintain ejectment when the testator had a lease for years, or from year to year, upon an ouster after his death. Williams, Ex'rs, 748; Slade's Case, 4 Coke, 95; Moreron's Case, 1 Vent. 30; Doe v. Porter, 3 Term R. 13; Rosc. Act. 545; Doe v. Bradbury, 16 E. C. L. 115. The action should have been brought in the name of the administrators of James Mantany. Livingston v. Proseus, 2 Hill, 529. For these reasons the judgment should be reversed, and a new trial granted, with costs to abide the event.

POTTER, J., concurred. BOCKES, J., dissented.

BARR v. GALLOWAY.

(Fed. Cas. No. 1,037, 1 McLean, 476.)

Circuit Court, D. Ohio. July Term, 1839.

At law.

Scott & Leonard, for plaintiff.
Stansbury & Bond, for defendant.

OPINION OF THE COURT. The plaintiff [David Barr's lessee] gave in evidence a patent from the United States to Charles Bradford for the land in controversy, dated the 14th May, 1796. The patentee died without issue, leaving Henry G. Bradford, Charles H. Bradford, Elizabeth J. Bradford, and Fielding M. Bradford his heirs at law. Henry and Charles died intestate and without issue. Elizabeth intermarried with John Finley. They had two children, Henry Heath Finley and Elizabeth J. Finley. The latter intermarried with David Barr, the lessor of the plaintiff, and is now deceased. The plaintiff also gave in evidence a deed to him for the land from Henry Heath Finley, and here he rested his case.

The defendant [James Galloway, Jr.,] gave a deed for the land in evidence from Fielding M. Bradford and John Finley, the husband of Elizabeth J. Bradford, and father of Henry Heath Finley, and of the wife of the lessor of the plaintiff; which was executed the 29th November, 1815. The wife of the grantor John Finley, died before the execution of this deed. Possession was taken by the defendant a short time after the date of this deed, and there is no proof of a prior possession.

In the argument of the case it was insisted, that no interest passed under the deed from John Finley to the defendant; as it was made subsequent to the death of his wife, and there is no evidence of actual seisin, which is necessary to be shown by the husband to enable him to claim the land conveyed, as tenant by the curtesy. And it is also insisted by the plaintiff, if seisin in fact, by the husband, during the life of his wife, were not necessary, yet it is incumbent to show that at the time of the conveyance there was no adverse possession.

Before deeds or feoffments were used for the conveyance of land, livery of seisin was the only evidence of title. And this livery was required to be made by entering upon the land, and there in the presence of the vicinage to deliver the possession. The notoriety of the act afforded the only evidence of title, for the whole rested in the memory of the witnesses, called to observe the ceremony. And after the invention of deeds and other written evidence of title, the ancient principles of the common law were only departed from so far as to consider the instrument, not as the title itself, but as the evidence of title. And that it authorized an entry on the land, without which the grantee could not convey the land, nor bring an action against a trespasser. Nor would it descend to his heirs on his decease. Without an entry, except in cases which shall be hereafter noticed, he could not bring an action on the title of the land. 1 Co. Litt. p. 29, c. 4, § 35. "Tenant, by the curtesy of England, is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail special and hath issue by the same wife, male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the laws of England." "And first of what seisin a man shall be tenant by the curtesy. There is in law a twofold seisin, viz: a seisin in deed, and a seisin in law. And here Littleton intendeth a seisin in deed, if it may be attained unto, as if a man dieth seised of lands in fee simple or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue and dieth before any entry, the husband shall not be tenant by the curtesy; and yet in this case she had a seisin in law; but if she or her husband had during her life entered he should have been tenant by the curtesy." "But if a man seised of an advowson or rent in fee hath issue a daughter who is married and hath issue and dieth seised, the wife, before the rent became due, or the church became void, dieth, she had but a seisin in law, and yet she shall be tenant by the curtesy, because she could by no means obtain to any other seisin. But a man shall not be tenant by the curtesy of a base right, title, use, or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture." 1 Coke, 123. By the common law lands or tenements cannot pass but by solemn livery, or matter of record, or by sufficient writing, if the thing lies in grant.

The wife at common law was endowable where there had been no actual possession, and the reason is, that during coverture she could not take possession of the lands of her husband. 2 Co. Litt. p. 358, § 681. "For tenant in freehold in land is he who, if he be deprived of the freehold, may have an assize, but tenant in freehold in law before his entry, in deed shall not have an assize. And if a man be seised of certain land, and hath issue, a son who taketh wife and the father dieth seised, and after the son dies before any entry made by him into the land, the wife of the son shall be endowed in the land, and yet he had no freehold in deed, but he had a fee and freehold in law."

Under the common law, actual seisin was necessary, to enable the husband to claim as tenant by the curtesy. But this rule was not inflexible. It yielded to circumstances, as in the case of an advowson or rent, or where an entry is prevented by force. 2 Co. Litt. §§ 417, 418. In like manner if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim

the land as his own, he hath presently, by such claim, a possession and seisin in the lands, as well as if he had entered in deed. 2 Co. Litt. § 419. And, under some circumstances, living within view of the land, will give the feoffee a seisin in deed, as fully as if he had made an entry. 1 Co. Litt. p. 29, c. 4, § 35. If an estate of freehold in seignories, rents, commons, or such like, be suspended, a man shall not be tenant by the curtesy, but if the suspension be but for years, he shall be tenant by the curtesy. As if a tenant make a lease for life of the tenancy to the seignories who taketh a husband and hath issue, the wife dieth, he shall not be tenant by the curtesy, but if the lease had been but for years he shall be tenant by the curtesy. And in 3 Atk. 436, the court say, lands on which there were leases for years existing and a rent incurred, descended on a wife as tenant in tail general, who survived three months after the rent day occurred, though she made no entry, nor received any rent during her life, yet this was such a possession in the wife as made the husband tenant by the curtesy. In Barwick's Case, 5 Coke, 94, it was held that letters patent under the great seal, do amount to a livery in law, and must give actual seisin. As where a livery is made of one parcel of land in the name of others in the same vicinity.

No livery of seisin is necessary to perfect a title by letters patent. The grantee in such a case takes by matter of record and the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage. The contrary is the fact as to feoffments. The deed is inoperative without livery of seisin. Green v. Liter, 8 Cranch, [12 U. S.] 229.

A perception of the profits, or, in more technical language, a taking of the esplees is evidence of seisin, but if seisin be established, this is presumed. Under the statute of uses the bargainee without entry or livery of seisin, has a complete seisin in deed. Harg. Co. Litt. 261, note. In most of the states of the Union statutes have been adopted, if not in the same language, to the same effect, as the statute of uses. The delivery of the deed is substituted for the ancient form of livery of seisin. And this is held to be a seisin in deed, where there is no adverse possession at the time.

The question in the present case is, whether wild and unappropriated lands, patented by the government, can descend, to a female out of possession so as to invest her husband, after her decease, with a tenancy by the curtesy, where there was no entry during coverture, either by the wife or husband. The reason on which livery of seisin was instituted, fails in this case. And it is a sound maxim that where the reason of the rule fails the rule itself can have no application. Why should a formal entry be made on land situated in a wilderness, remote from human habitation? Such an entry could not be notorious, as there is no vicinage to witness the act, or preserve the fact. If the law requires nothing in vain, it cannot require an entry under such circumstances. If an entry is dispensed with, where there is a lease for years, an advowson or rent, or where force is used to prevent, as above stated, is not the reason as strong, to excuse an entry on land in an uninhabited country? The law can never require an individual to do that which is either impracticable or unreasonable. And what could be more unreasonable or absurd than to require an entry on wild lands, to vest a complete title in the grantee?

In the case of Green v. Liter, [8 Cranch, (12 U. S.) 229,] above cited, the court held emphatically, that an entry was unnecessary. And the same doctrine is laid down in 4 Day, 294. And in the case of Jackson v. Sellick, 8 Johns. 208, the court say, where a feme covert is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed so as to enable her husband to become a tenant by the curtesy. An actual entry or pedis positio by the wife or husband, during the coverture is not requisite to the completion of a tenancy by the curtesy. This is believed to be the correct rule as generally recognized in this country. Adhering to what they conceive to be the common law on the subject, the court of appeals of Kentucky hold that to sustain a writ of right, it is necessary for the demandant to show a pedis positio. And on this point that court holds a different doctrine from the supreme court of the United States. Applying this rule to all cases and under all circumstances, as the court of appeals are understood to do, they are unquestionably wrong. For it has been shown that there are exceptions to the rule. But it must be admitted that the rule is of general application, only subject, like most other general rules, to certain exceptions. And it is believed that wild and uncultivated lands in this country form as strong a case, for an exception to the rule, as any above stated. But admitting the rule here laid down as correct, the counsel for the plaintiffs insist that it is incumbent on the person claiming under a deed, to show, if not a pedis positio, at least that the land conveyed was wild and uncultivated, and that there was no adverse possession, when the deed was executed. That these being essential to the validity of the deed, the party who claims under it, must prove them.

An adverse possession cannot be presumed against a deed. If it exist, it must be shown by the party who impeaches the deed and endeavors to avoid it. In the case of Holt's Heirs v. Hemphill's Heirs, 3 Ham. [3 Ohio,] 238, the court say we have always held that a complete title may be executed, without an actual entry and where the grantee may never have been within hundreds of miles of the property granted. The delivery of the deed has been considered as giving posses-

sion in contemplation of law, and the grantor is presumed to have entered, unless that presumption is rebutted by facts wholly inconsistent with it, as where the premises at the time of the grant, are in the actual seisin of a third person claiming title adverse to the grantor. In the case of Green v. Watkins, 7 Wheat. [20 U. S.] 27, the supreme court observe, where the demandant shows no seisin by a pedis positio, but relies wholly on a constructive actual seisin, in virtue of a patent of the land as vacant land, it is competent for the tenant to disprove that constructive seisin, by showing that the state had previously granted the same land to other persons with whom the tenant claims no privity. And again in the same case, the court say in a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disproving the demandant's seisin. In the case of Bush v. Bradley, 4 Day, 298, the court held that proof of an adverse possession does not prevent the estate by the curtesy from attaching. But it is unnecessary to consider this point, as it does not arise from the facts in the case.

We think that the four requisites to constitute a tenancy by the curtesy, which are marriage, seisin, birth of a child, and death of the wife, have been sufficiently shown by the defendant to sustain the deed from Finley to him. Indeed none of the requisites, except that of seisin, are disputed. And we are clearly of the opinion that there was seisin in deed in this case, which gave Finley a right to claim as tenant by the curtesy; and consequently that his deed to the defendant conveys a life estate in the premises in controversy.

THOMPSON v. MORROW.

(5 Serg. & R. 289.)

Supreme Court of Pennsylvania. Sept. Term, 1819.

TILGHMAN, C. J. The record in this case presents two bills of exception, taken on the trial of this cause in the court of common pleas of Allegheny county. It is an action of dower, brought by Elizabeth Thompson, widow of Moses Thompson, deceased.

1. A deed from the said Moses Thompson and Elizabeth his wife (the plaintiff), conveying in fee simple the land in which dower is now demanded, to Robert Henderson, under whom the defendant claims, having been given in evidence by the defendant, the court were of opinion, that by virtue of this deed, the plaintiff was barred of her dower, although it did not appear, that she was privately examined by the justice of the peace who took her acknowledgment. This point having been decided in the case of Kirk v. Dean, 2 Bin. 341, and that decision recognised by this court in several subsequent cases, it is unnecessary, at present, to say anything more, than that we consider the law as settled. There was error, therefore, in the decision of the court of common pleas.

2. After the conveyance by Moses Thompson to Robert Henderson, the land in which dower is claimed (being a lot of ground in the city of Pittsburgh) was increased in value by the erection of buildings; and the value was, besides, greatly increased by the growth of the city, and other causes distinct from any buildings or improvements made by the purchaser. The court of common pleas were of opinion, that in assigning dower to the plaintiff, no regard was to be had to the gradual increase of value from causes unconnected with improvements made by the purchaser, but that the plaintiff was to have one-third, according to the value at the time of the alienation by Moses Thompson. It is a point of great importance to widows, and to all those who purchase from married men without legal conveyances from their wives; we have, therefore, had it twice argued, in order that we might avail ourselves of the industry and talents of the learned counsel on both sides.

Dower is a claim founded on law, and favored by courts both of law and equity. It is a right flowing from marriage; and marriage is so highly regarded as to be a valuable consideration for the settlement of property on the wife. By marriage, the husband acquires an absolute right in his wife's personal estate, a right to the possession and profits of her real estate during the coverture, and also a right to her real estate during his life, in case he survives her, provided he has issue by her, and the estate be of such a nature, that the issue may, by possibility, inherit it. In return for all this, the law gives to the wife, in case she survives her husband, one-third, for her life, of all the real estate whereof her husband was seised at any time during the coverture, whether she have issue by him or not, provided the estate be of such a nature, that any issue which might have been born, might, by possibility, have inherited it. The right of dower is inchoate, on the marriage, but not consummate till the death of the husband. No act of the husband can lessen or defeat it. But, during the marriage, his right is absolute; he may improve the estate or suffer it to lie waste; erect buildings or pull them down at his pleasure. All that the wife can claim, where the husband dies seised, is one-third of the land in the condition in which it is found at the time when her title is thus complete, viz. at the death of her husband. But if, after her title is thus complete, and before assignment of dower, the heir erects buildings or makes other improvements, the widow shall be endowed of one-third part of the estate, according to its value at the time dower is assigned to her; because it was the folly of the heir to make improvements on land which he knew to be subject to dower. Co. Litt. 32a, § 36.

The law is different, however, when the husband aliens the land during coverture, for there the wife shall derive no advantage from any improvement made by the alienee. There is no injustice in this, for, if the husband had never alienied, he might not have made these improvements. And it would affect the prosperity of the country, by discouraging improvements in building and agriculture, if the wife were to be endowed of one-third of the value, including these improvements. This I take to have been the main reason for excluding the wife from any part of the value arising from improvements; although we find in the old books another reason assigned, that is to say, that as the tenant in dower, who vouches the heir on a warranty of his ancestors, must recover of the heir, according to the value of the land, at the time of the alienation, it would be unreasonable that the widow should recover of the tenant according to any other value. So far as concerns improvements made by the alienee, it is agreed that the tenants shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the widow, if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate, which may arise either from public misfortune or the negligence or even the voluntary act of the alienee; for although he destroy the buildings erected by the husband, the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband. Perk. Conv. § 829.

There are not many authorities on this subject to be found in the English books, and such as we have are bottomed on decisions said to be reported in the Year Books. Mr. Hargrave, in his note on Co. Litt. 32a, § 36, cites 1 Hen. VII.; 17 Edw. III.; 17 Hen. III. "Dower," 192; 31 Edw. I. "Vouch." 288. "If the feoffee

improve by buildings, yet dower shall be as it was in the seisin of the husband, for the heir is not bound to warrant except according to the value as it was at the time of the feoffment; and so the wife would recover more against the feoffee, than he would recover in value, which is not reasonable." It is to be remarked that the decision in the cases here cited was upon improvements by buildings erected by the feoffee; the decision, therefore, was clearly right, although a better reason might, perhaps, be given, than that which is said to be assigned for it, in the Year Books. In Jenk. Cent. pp. 34, 35, case 68, in which the Year Book 47 Edw. III. 22, is cited, we have the law laid down as follows: "On voucher, if special matter be showed by the vouchee, viz. that the land, at the time of the feoffment, was worth only £100, and now, at the time of the voucher, is worth £200, by the industry of the feoffee, the tenant shall recover only the value, as it was at the time of sale, for if the act of the feoffee has meliorated the land, this shall not prejudice the feoffor in his warranty." Here is satisfactory reasoning indeed. The warrantee shall not, by any acts of his own, increase the responsibility of the warrantor, for that would, in effect, be to alter the contract of warranty. But even granting that the tenant, who vouches the heir, can recover from him only according to the value at the time of the alienation, this being the true construction of the warranty, the wife of the feoffee, who is no party to the warranty, ought not to be injured by it. So far as her rights are concerned, she ought not to be affected, but by those reasons of policy and justice, which apply to her case; reasons which extend only to improvements made by the feoffee.

As the Year Books are principally relied on, by those who contend that the widow is to recover according to the precise value at the time of the alienation, I endeavored to trace the subject through those books, but met with great difficulty, from the imperfection of the printed editions. I believe, I have seen all which have ever been printed but it appears by a report of a committee of the British house of commons appointed for the purpose of inquiring into the state of the public records, in the year 1800, that although there are Year Books from the reign of Edward I. (inclusive) to the 1st of Henry VIII., yet, in the printed editions there are the following chasms: The whole reign of Edward I. (except some short notes in the exchequer); of the reign of Edward III., ann. 11 to 16, ann. 19, 20, and 31 to 37; whole reign of Richard II.; of Henry V., ann. 3, 4, and 6; of Henry VII., ann. 17, 18, 19. And it appears from the same report, that in some instances the manuscripts contain different reports of the same cases. It is to be remarked in general of such reports as we have in these books, that they are often so short as to be obscure and unsatisfactory.

With respect to dower, however, I have found no adjudged case in the Year Books confining the widow to the value at the time of the alienation by her husband where the question did not arise on improvements made after the alienation.

In our own state it does not appear that the point now in question has been decided, although I have certainly considered the general understanding to be that the widow should have the advantage of all increase of value not arising from improvements made after the alienation. And such I know to have been the opinion of my deceased colleagues, Judges Yeates and Brackenridge. As to the case of Winder v. Little, 1 Yeates, 152, although the point on which the court decided is not expressly stated, yet enough appears to satisfy me that it was a question on improvements. By the supreme court of New York, justly commanding the highest respect, the law has been held differently. But they have a statute of their own by which this matter is regulated. It is true that court, in delivering its opinion, did say, that the statute made no change in the common law; still, however, the decision was upon the statute, and therefore what was said of the common law ought not to be considered as more than a dictum. The New York cases on this subject will be found in 2 Johns. 484; 11 Johns. 510; 13 Johns. 179. In Massachusetts, the supreme court have in several cases decided that, so far as concerns buildings or other improvements, the widow shall take her third according to the value, exclusive of the improvements. 9 Mass. 218, Id. 8, 10 Mass. 80, 13 Mass. 227. But as to increase of value not arising from improvements, the opinion of the late Chief Justice Parsons may be collected from what fell from him, in the case of Gore v. Brazier, 3 Mass. 544. His words are these: "If the husband, during coverture, had aliened a real estate in a commercial town, and at his death the rents are trebled, from causes unconnected with any improvement of the estate, and the widow should then sue for her dower, perhaps it might be difficult for the purchaser to maintain that one-ninth only, and not one-third, should be assigned to her." I am not aware that this opinion has ever been contradicted in Massachusetts, and therefore I presume that the law is held there in conformity to it. Having considered all the authorities which bear upon this question, I find myself at liberty to decide, according to what appears to me to be the reason and the justice of the case, which is, that the widow shall take no advantage of improvements of any kind made by the purchaser, but, throwing those out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her. The judgment is, therefore, reversed and a venire facias de novo awarded.

Judgment reversed and a venire facias de novo awarded.

STOUGHTON v. LEIGH.

(1 Taunt. 402.)

Court of King's Bench. 1808.

Shepherd & Best, for the dowress. Mr. Lens, contra.

MANSFIELD, C. J. The grant of the stratum must be taken to be a grant in fee-simple. In the course of the discussion I was strongly struck with the argument used for the heir, that Lord Coke has in 1 Inst. 32, enumerated all the species of inheritance of which a woman shall be endowed: and I thought it extraordinary that no mention should be made of mines. But upon referring to the passage, it appears to be no enumeration of all the things whereof a woman shall be endowed. Nothing like it. In the 36th section, upon which this passage is a commentary, Littleton says, the wife shall be endowed of all lands and tenements of which her husband was seised. Lord Coke says not a word to explain what is land or what is a tenement, thinking the import of those terms well known in the law. But the intention of the passage is, to show, that though all lands and tenements are subject to dower, and assignment is to be made by metes and bounds where it can, yet it is no impediment to dower that the tenements are of such a nature, as that they cannot be assigned by metes and bounds; but in those cases it shall be assigned as well as it can be, as by the third toll-dish of a mill, or the like. In the preceding chapter, which is of tenant by the curtesy, Littleton does not mention of what the wife must be seised; and Lord Coke (page 29b) speaks of lands only, but Littleton (section 52) speaks of tenements. The words in both cases must receive the same exposition: and it is only necessary to see whether this species of property be land or a tenement. Comyn, and the other digests which have been cited, only follow the words of Co. Litt., the reason of whose authority is above stated. In the case of trees there is a profit in the shade and pannage, but in the case of a mine, the working it is the only mode in which it can be enjoyed.

A second argument was prayed on behalf of the heir, which the court refused, thinking the case sufficiently clear.

The court certified to the high court of chancery that their opinion upon the questions proposed to them, arising from the first and second statements in the case, was, that the widow of John Hanbury was dowable of all his mines of lead and coal, as well those which were in his own landed estates as the mines and strata of lead or lead ore and coal in the lands of other persons, which had in fact been open and wrought before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death.

They thought too that her right of dower of such mines, &c., could not be in any respect affected by leases made by the husband during the coverture; but if any of the existing leases for years were made by the husband before marriage, then the endowment (if made of the mines), must be of the reversions and of the rents reserved by such leases as incident to the reversions; in which case they thought the widow would be bound so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations. They were also of opinion that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not.

In assigning the dower of Mr. Hanbury's own lands, the sheriff must estimate the annual value of the open mines therein as part of the value of the estates of which the widow is dowable; but it was not absolutely necessary that he should assign to her any of the open mines themselves, or any portions of them. The third part in value which he should assign to her might consist wholly of land set out by metes and bounds, and containing none of the open mines. Or he might include any of the mines themselves in the assignment to the widow, describing them specifically if the particular lands in which they lie should not also be assigned; but if those lands should be included in the assignment, the open mines within them might, but were not necessarily to be so described, being part of the land itself which was assigned; and as the working of open mines was not waste, the tenant in dower might work such mines for her own exclusive profit. Or the sheriff might divide the enjoyment and perception of the profits of any of the particular mines as after-mentioned.

In regard to the mines and strata which Mr. Hanbury had in the lands of other persons, they were of opinion that it was not necessary that the sheriff should divide each of the mines or strata; but he might assign such a number of them as might amount to one-third in value of the whole, or he might proportion the enjoyment of such of them as he should think necessary, so as to give each a proper share of the whole.

If the division of an open mine could be made by metes and bounds, as lands are required to be divided without preventing the parties from having the proper enjoyment and perception of the profits, they thought that mode should be adopted; but as the property seemed to them to be incapable of a beneficial severance in that way, they thought the case analogous to some of those stated by Lord Coke (1 Inst. 32a); wherein it is held that the sheriff may make the assignment in a special manner; and that therefore he might so proceed with respect to the mines in question. They found no authority, however, establishing any precise mode of dividing a mine, nor could they point out any that might not be attended with inconvenience; but if the sheriff was to make the assignment, they thought he might lawfully execute his

duty by directing separate alternate enjoyment of the whole for short periods, proportioned to the share each had in the subject, or by giving the widow a proportion of the profits.

In answer to the last question proposed to them, they were of opinion that the widow was entitled to work for her own exclusive use the open mine within the close that had been assigned to her without any exception of the mine, for her dower of one of the estates, notwithstanding the excess arising from the omission of such exception; and inasmuch as the assignment was the act of the heir himself, being of full age at the time, they thought he had no remedy at law against the dowress for avoiding the consequences of that act. Had he been under age at the time, he might have had relief by writ of admeasurement of dower; or had the assignment been made by the sheriff in execution of a judgment in dower, the heir might have had a scire facias to obtain an assignment de novo.

STANWOOD v. DUNNING et al.

(14 Me. 290.)

Supreme Judicial Court of Maine. 1837.

Willis & Fessenden, for demandant. Mr. Mitchell, for defendants.

EMERY, J. The only question in this case is, whether on the facts legally and properly proved, David Stanwood had such seisin of the premises as could entitle the demandant to dower. Premising, that family settlements made without fraud, are justly entitled to the favorable consideration of courts, we proceed to suggest our ideas of the merits of the case, as disclosed in the agreed statement of facts. The claim of dower, it has long been said, is to be favored. Still unless the husband were legally and beneficially seised of the estate during the coverture, the wife is not entitled to dower. But if the land vests in the husband but for a single moment beneficially for his own use, the wife shall be endowed.

It is said, that the case cited by plaintiff from Cro. Eliz. 503, which is Broughton v. Randall, is differently reported in Noy, 64. In Cro. Eliz. it is said, the title of the feme to recover dower was, that the father and son were joint-tenants to them, and the heirs of the son; and they were both hanged in one cart; but because the son, as was deposed by witnesses, survived, as appeared by some tokens, viz. his shaking his legs, his feme thereupon demanded dower, and upon this issue, nunques seizu dowers, this matter was found for the demaudant.

In 1 Rop. Prop. 369, the case of Broughton v. Randall, is thus stated. A father was tenant for life, remainder to his son in tail, remainder to the right heirs of the father. Both of them were attainted of felony and executed together. The son had no issue, and the father left a widow. Evidence was given of the father having moved or struggled after the son, and the father's widow claimed dower of the estate, and it was adjudged to her. The principle appears to be this: that the instant the father survived the son, the estate for life of the father, united with the remainder in fee limited to him upon the determination of the vested estate tail in the son, so that the less estate having merged in the greater, the father became seised of the freehold and inheritance for a moment during the marriage, to which dower attached itself.

But if the instantaneous seisin be merely transitory, that is, when the very same act by which the husband acquires the fee, takes it out of him, so that he is merely the conduit for passing it, and takes no interest, such a momentary seisin will not entitle his widow to dower.

An illustration is given in the English books, that if lands be granted to the husband and his heirs by a fine, who immediately by the same fine renders it back to the conusor, the husband's widow will not be entitled to dower of such an instantaneous seisin. Dixon v. Harrison, Vaughan, 41; Cro. Car. 191; Co. Litt. 31.

In this case, the marriage, death of the husband, and demand of dower are admitted, but his seisin is denied.

Without going into an examination of the law relating to the four species of fines used in England, we may remark, that it is considered there as one of the most valuable of the common assurances of that realm, being in fact a fictitious proceeding, to transfer, or secure, real property, by a mode more efficacious than ordinary conveyances. 1 Co. Litt. 121a.

But to show how this mode of passing property bears on the seisin of the husband, so far as instantaneous in the case of a fine, compared with it in case of bargain and sale, the case of Nash v. Preston, Cro. Car. 191, is not inappropriate. It was a bill in chancery. "J. S. being seised in fee, by indenture enrolled, bargains and sells to the husband for £120, in consideration, that he shall re-demise it to him and his wife for their lives, rendering a peppercorn; and with a condition, that if he paid the £120 at the end of 20 years, the bargain and sale shall be void. He re-demiseth it accordingly and dies; his wife brings dower. The question was, whether the plaintiff shall be relieved against this title of dower. Jones, J., and Croke, to whom the bill was referred, conceived it to be against equity and the agreement of the husband at the time of the purchase, that she should have it against the lessees, for it was intended that they should have it re-demised immediately to them, as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be re-demised, the wife of the mortgagee shall not have dower. And if a husband take a fine sur cognizance de droit comme ceo, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him, quasi uno flatu, and by one and the same act. Yet in this case, they conceived, that by the law she is to have dower; for by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have dower; and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly, that he did not coujoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower, for it is against the rule of law, viz. "where no fraud or covin is, a court of equity will not relieve." And upon conference with other the justices at Serjeant's Inn, upon this question, who were of the same judgment, Jones and Croke certified their opinion to the court of chancery, "that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof."

The case of Holbrook v. Finney, 4 Mass. 566, recognizes that which we have just recited as sound law.

In the case now under discussion, the deed from William Stanwood to David Stanwood bears date the 1st of March, 1824, is acknowledged on the 6th of the same month, and re-

corded March 16th, 1824. It is a deed of bargain and sale to said David in fee for the consideration of love and affection with general warranty.

The deed from David Stanwood to Charles Stanwood is dated the 6th of March, 1824, acknowledged the same day, and recorded March 11th, 1824. But if requisite so to examine in order to help to a decision, it is manifest from inspecting the deed from William to Charles Stanwood, that in the order of time the deed to David from William was made first, and then it is apparent that David became rightfully seised in fee, and beneficially so, though for a short time.

The fee was not rendered back by David to William, quasi uno flatu, and therefore the demandant is entitled to dower. It is agreed that the object of the father was to divide his estate among his sons. Nothing could more strongly evince the propriety of leaving the law to raise the future benefit to the wife of David in dower after his decease, if his notorious insolvency might put at hazard the beneficial continuance of the property in him during his life.

The questions about the admissibility of any other evidence of former or subsequent agreements and conversations, it is unnecessary to examine further than to say, that those which preceded the deed of William to David were merged in that conveyance. And the subsequent agreements and conversations do not abridge the plaintiff's right. But we reject them. The purchasers under Charles Stanwood are estopped to deny the seisin of David. Kimball v. Kimball, 2 Greenl. 226.

Upon every view of which the case is legally susceptible, on the facts legally and properly proved, we are satisfied that David Stanwood had such seisin of the premises, as would entitle the demandant to dower.

The defendants must be defaulted.

WOODS v. WALLACE.

(10 Fost. 384.)

Superior Court of Judicature of New Hampshire. Hillsborough. Dec. Term, 1854.

Bill in equity. The bill alleged that the plaintiff was the widow of Aaron Woods, late of Nashville; that during the coverture said Aaron was seised of the premises in which the plaintiff claims dower in this bill. It is further alleged that on the 7th day of December, 1849, while so seised, the said Aaron conveyed the premises in mortgage to one Z. Shattuck, to secure the payment of the promissory note of said Aaron to said Shattuck, which mortgage was in no wise signed by the plaintiff, and, moreover, the note thus secured has never been paid. The bill further alleged a mortgage made by said Aaron to Benjamin M. Farley, Esq., to secure the payment of a promissory note for $500 from said Aaron to said Farley, and the plaintiff signed said deed, and thereby relinquished her right of dower in the premises, as against the last named mortgagee.

It alleged, also, that the defendant purchased and took an assignment of the Farley mortgage.

The bill further averred the death of said Aaron Woods, and also a sale by A. W. Sawyer, his administrator, of all his right in equity of redeeming the mortgaged premises, to the defendant. The seisin of the husband during coverture, the execution of the mortgage to Shattuck, and also of the Farley mortgage, and the assignment of them to the defendant, as well as the sale of the equity of redemption to the defendant, were admitted by the answer, and are not facts in controversy between the parties.

The complainant furthermore averred an offer to pay the defendant her fair proportion of the amount of the Farley mortgage, and prayed that her dower might be adjudged and duly assigned to her in the premises.

Mr. Farley, for plaintiff. A. W. Sawyer, for defendant.

WOODS, J. Upon this state of facts alleged and admitted, the mortgage to Shattuck can furnish no answer to the claim of dower made by the plaintiff. It was simply a deed of mortgage, made by the husband alone, during the coverture, and could not affect the plaintiff's rights. The husband can no more encumber or defeat the right of dower of the wife by a mortgage, in this state, than he can convey it by an absolute deed. It is familiar law in this state that the husband's conveyance will in no wise affect his wife's right of dower. It can only be done by her own act. Indeed, we are not aware that it is claimed that he can affect or defeat her estate by his individual conveyance. The Shattuck mortgage, then, may be laid out of the case. The mortgage deed to Farley was signed by the plaintiff as well as her husband, and her claim of dower in the premises thereby relinquished, as against the grantee in that deed, his heirs and assigns. Is the plaintiff entitled to dower in the premises, and if so, is she entitled to the extent of the use of one third of the premises, upon making contribution in the manner proposed in the bill? These are the questions arising upon the bill and answer. The claim of dower made in this case does not rest upon the mere right in equity of redemption of the husband. It is, however, well settled that a widow is dowable of an equity of redemption. To be sure, it is not a right which can be enforced at common law, but is to be worked out through the aid of the courts of equity, according to the rules and principles governing those courts, where the rights of all the parties interested can be considered and settled, or perhaps upon a petition under chapter one hundred and thirty-one of the Revised Statutes, relating to mortgages of real estate. Cass v. Martin, 6 N. H. 25.

At the date of the deed Woods and wife each had distinct rights in the land. The plaintiff had an inchoate right of dower in the premises, which, as against all persons but such as claim by or from herself, became perfect upon the death of her husband. The husband had the remaining interest in the premises. The interest of each in the land was encumbered by the act of each in the execution of the deed. Neither of the mortgagors could redeem as against the mortgagee, without the payment of the whole debt which the mortgage was intended to secure. Cass v. Martin, 6 N. H. 25; Gibson v. Crehore, 5 Pick. 146; Robinson v. Leavitt, 7 N. H. 74; Russell v. Austin, 1 Paige, 192; 2 Pow. Mortg. 689.

At present the plaintiff has a right of dower encumbered by the mortgage, and the defendant has the right in equity of the husband, and also holds the mortgage interest by purchase and assignment.

Can the widow be permitted to enjoy any interest in the premises, excepting upon the payment by her of the whole Farley mortgage debt to the defendant? Or may she entitle herself to be endowed of any part of the estate upon payment of her fair proportion of the debt according to her dower interest? The bill and answer show that the defendant set off to the plaintiff an interest in the premises less than one third part. But we are of the opinion that she was entitled, upon making her proper contribution, to a greater share or interest. Upon payment of her proper share of the debt she was entitled to be let in upon her dower in the same manner in which she would have been entitled if she had never encumbered the estate by the execution of the mortgage.

If we look at the exact relation of the several parties to the estate, we think the rights of each will be apparent. The defendant, in the first place, purchased the Farley mortgage, and it was assigned to him upon his paying the amount of it. He subsequently purchased the right which Aaron Woods had at his death to redeem the premises. After the purchase of the equity of redemption, as we conceive, he stood in the same position, and had the same rights which he would have had if he had first

purchased the equity of redemption, and afterwards had paid the amount of the mortgage, or had taken an assignment of it. In either case he would be in equity and in law the purchaser and owner of the mortgage by way of redemption. The plaintiff also has the same rights in the estate that she would have had if the purchase of the equity had been made by the defendant, in the first instance, and the mortgage afterwards. She has an interest in the estate mortgaged, she having executed a mortgage deed only, and not an absolute deed to the mortgagee.

Having an interest in the premises, she has, like all other parties thus situated, a right to redeem. That is a universal principle.

What is she to do to entitle herself to redeem, or how is she to avail herself of her right to redeem?

The defendant, when he purchased, and so long as he held the mortgage interest only, of Farley, was entitled to receive of the plaintiff, or of any one holding the equity of redemption, the entire sum secured by the mortgage. There was no principle of law or equity that could conflict with that right. Upon no ground could the plaintiff, or any other one holding the equity of redemption, redeem, short of a payment of the entire sum secured by the mortgage. Cass v. Martin and Robinson v. Leavitt, before cited, and Rossiter v. Cossit, 15 N. H. 38.

But when the defendant purchased the equity, she became entitled, as against him, to be endowed of one third part of the premises, upon contributing her just proportion of the mortgage debt, according to the value of her interest.

We think it would be idle to hold that the defendant was entitled to receive the whole amount of the mortgage before the complainant could be let in upon her dower estate; for if she should so pay the amount of the mortgage, she would clearly be entitled to the whole premises, until contribution should be made to her by the defendant. Swaine v. Perine, 5 Johns. Ch. 482; Call v. Butman, 7 Greenl. 102; Robinson v. Leavitt, ubi supra, and cases there cited. The estate of each in the land was liable for the whole mortgage debt. He could avail himself of the equity of redemption purchased by him at the administrator's sale in no other way than by contributing his fair proportion of the mortgage debt. Taylor v. Bassett, 3 N. H. 294.

Why, then, should she be driven to the idle ceremony of paying the whole mortgage, thereby giving the defendant the right to regain his interest in the premises by refunding to her his share? Such a course, we think, is not required, nor is it in accordance with well considered decisions in like cases.

Perhaps another view of the case may be taken, leading to the same result. The purchase of the interest of Aaron Woods in the estate, that is, of the equity of redemption, may well be considered as an extinguishment of so much of the mortgage debt as shall bear the same proportion to the whole debt secured by the mortgage, as the value of that interest in the premises bears to the whole interest of both the mortgagors—or the whole estate. Certainly that is an equitable view. It is the duty of a purchaser of an equity to redeem from the mortgage. If he holds the mortgage it should be considered as extinguished to that extent. To entitle herself, then, to be endowed, the complainant must pay the balance to the defendant, or offer to do it. This she did offer to do. And so upon paying the same into court after its amount shall be ascertained by an auditor or master appointed for the purpose, she will be entitled to have her dower set off to her in the premises.

Let a decree be entered accordingly.

PULLING v. PULLING'S ESTATE.

(56 N. W. 765, 97 Mich. 375.)

Supreme Court of Michigan. Nov. 10, 1893.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Petition by Jeane W. Pulling for assignment of dower in the estate of Henry P. Pulling, deceased. From a decree of the circuit court reversing an order of the probate court, which assigned dower, petitioner appeals. Reversed.

Fraser & Gates, for appellant. William J. Gray, for appellee.

McGRATH, J. The circuit judge found that Henry P. Pulling and Jeane W. Pulling were married April 26, 1890; that said Henry P. Pulling died July 15, 1890, leaving appellant, his widow, surviving him; that, at the time of his death, said Henry P. Pulling was seised in fee of 10 parcels of land; that, prior to the marriage of Henry P. Pulling, he had made and executed 9 separate contracts for the sale of said parcels of land; that at the time of said marriage, and also at the time of his death, the vendees under said contracts were, respectively, in the possession of the several tracts of land under said contracts, which were then in full force, —that is, none of them had been declared forfeited. The purchase price, in one instance, was $400; in another, $800; and in another, $1,000. The others were from $1,100 to $1,400. The aggregate consideration was originally about $49,000. Payments had reduced this amount to $45,000. The sole question raised is whether, as between the widow and the estate, the interest in these lands shall be treated as realty or as personalty. The circuit judge found, as a matter of law, that the widow was not entitled to dower in these lands, and the widow appeals.

Our statute provides (How. Ann. St. § 5733) that "the widow of every deceased person shall be entitled to dower, or the use during her natural life, of one-third part of all the lands whereof her husband was seised of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof." It is insisted on behalf of the estate that, at the time of the marriage, Henry P. Pulling held the legal title only in trust for the purchasers. The cases cited, however, in which this has been asserted, and the right to dower denied, are, without an exception, cases where the vendee has paid the entire consideration. In Kintner v. McRae, 2 Cart. (Ind.) 453, A., in 1836, sold to B., who took a portion of the purchase money, gave his note for the balance, and took a bond conditioned that the deed should be made when all of the purchase money should be paid. A. afterwards filed a bill to enforce the payment, and in 1845 the land was sold to C. A. married in 1842, and died in 1847. The widow petitioned for dower in the land sold to C. Dean v. Mitchell, 4 J. J. Marsh, 451, follows Stevens v. Smith, Id. 65, where A., unmarried, executed an unconditional obligation to convey to B., and during coverture A. had conveyed. In Dean v. Mitchell, the court say: "The trust existed when A. married, and therefore, as he has never been, since his marriage, beneficially seised, but held only as a trustee, his wife has no right to dower." In Oldham v. Sale, 1 B. Mon. 76, the husband had, before marriage, received the full consideration, and given a bond for a deed. In Gaines v. Gaines, 9 B. Mon. 295, the principle was applied to a bona fide gift made before coverture to a child by a former marriage, who took possession and improved the land under the gift, claiming it as his own before the coverture, and received the conveyance from the husband afterwards. In Rawlings v. Adams, 7 Md. 26, the bond for the deed given before marriage recited full satisfaction for the land. In Cowman v. Hall, 3 Gill & J. 398, all of the conditions of the contract had been performed by the defendant before the marriage. In Firestine v. Firestine, 2 Ohio St. 415, the husband had, for considerations partly good and partly valuable, agreed to convey certain lands to his son, who paid the valuable consideration and took possession, and after the father's remarriage a conveyance was made to the son. In none of these cases had the husband, even at the time of the marriage, any beneficial interest in the land. In Adkins v. Holmes, 2 Cart. (Ind.) 197, A., while unmarried, agreed to convey the land in question to B. for $975. A. afterwards married and died. During A.'s lifetime, B. had paid all of the purchase money, excepting $229, and that amount he had paid to A.'s administrator. The petition was filed against B. In Beckwith v. Beckwith, 61 Mich. 315, 28 N. W. Rep. 116, the husband had, prior to his marriage with plaintiff, entered into a contract with the son by a former marriage, under which the son was to have the use of the entire farm during his father's lifetime, and until certain debts were paid. The son was to pay to the father, during his lifetime, one-half, or so much thereof as he might require, of the net proceeds of the farm. The father, in consideration of the contract provisions, executed a deed to the son of an undivided one-half of the farm, and deposited the same in escrow, to be delivered to the son on the performance of the contract. In 1883 the father married plaintiff, and died in 1884. By his will, afterwards executed, he devised one-half of the land to his son, and the other half to his wife. By codicil he gave to the wife a sum of money in lieu of the half of the land. Upon the execution of the contract, the son entered upon its performance; and in 1885, when plaintiff demanded her dower in the land, the son had paid the unsecured debts, had reduced the mortgage upon the land from $8,000 to $5,500, and was in peaceable possession. It was held, in that case, that the plaintiff's

right to dower in said land was subject to the equities existing between her husband and defendant, under the contract and deed at the time of her marriage, which could not destroy and impair the same.

In the present case, it is not sought to subject the purchaser's interest, nor the interest held by the husband at the time of the marriage, to dower. The only claim made is that the interest held at the time of his death shall be regarded as realty. It is purely a question of the quality of that interest. The husband died seised, not of the legal title alone, but of the legal title with a beneficial interest aggregating $45,000. A court of equity would undoubtedly interpose in any case to protect the interest of the purchaser, and this would be so even though the purchase money had all been, in fact, paid during the lifetime of the husband. The wife's rights would be regarded as attaching subject to the subsisting claim or existing contract, and would be liable to be defeated by the performance of the conditions of the contract by the purchaser during coverture. As is said in 4 Kent, Comm. 50, "The wife's dower is liable to be defeated by every subsisting claim, in law or equity, existing before the inception of her right." In the present case the wife's dower has been defeated only so far as the amount due upon the contracts has been reduced by payment. Even though a trust be implied, it is one coupled with a beneficial interest, and it is well settled that the wife of a trustee is entitled to dower commensurate with the husband's interest. Id. 43. In Bowie v. Berry, 3 Md. Ch. 359, the husband, in 1832, during coverture, purchased the land, taking from the vendor a bond conditioned to convey the title on payment of the purchase money. In 1839 the husband sold the land, and gave to the vendee a bond for the deed. In 1843 the husband paid the balance of the purchase money on his purchase, and took a deed, and died in 1848. At his death a portion of the purchase money upon the contract for sale made by him was unpaid. The court in that case say: "It may be that in equity an agreement of the husband before dower attaches will, if enforced in equity, extinguish the claim to dower; but no case, I apprehend, can be found, in which it has been held that the mere agreement to convey, after the inception of the title to dower, has defeated the title, though an actual conveyance without the concurrence of the wife would have done so. No case has been decided in which it has been held that the mere executory contract to convey by the husband has had the effect to defeat the dower." Although, in that case, the legal title vested in the husband after marriage, he had before marriage entered into a contract to convey that title, and there is no difference in principle between that case and the present. How. St. § 5887, only applies to cases where a forfeiture has been declared, and, in any event, could only apply to the three contracts, not exceeding $1,000 in amount. It follows that the widow is entitled to dower in the interest held by the husband at the date of his death, that interest being represented by the amouut then due upon these contracts. We discover no difficulty as respects the admeasurement. Dower cannot be assigned of the lands in question, but a sum in lieu of dower may be awarded. Brown v. Bronson, 35 Mich. 415. The judgment of the circuit court will therefore be reversed, with costs of both courts to appellant, and the judgment of this court certified to the probate court for the county of Wayne. The other justices concurred.

HODGES v. PHINNEY et al.

(64 N. W. 477.)

Supreme Court of Michigan. Oct. 1, 1895.

Appeal from circuit court, Gratiot county, in chancery; Sherman B. Daboll, Judge.

A bill by Amelia Hodges against Ansel H. Phinney and others, to foreclose a mortgage. From a decree for plaintiff, defendant Newcomb appeals. Reversed.

Luke S. Montague, for appellant. W. E. & J. H. Winton, for appellee.

GRANT, J. The question, as stated by the complainant's counsel, is: Could she buy the mortgage upon the land admeasured to her as dower, and enjoy all the rights thereunder that Dutton, the original mortgagee, had? As stated by the defendant's counsel the question is: Is not a widow endowed, owning a mortgage covering the land set off to her as dower, bound to keep the interest down? It is the duty of the life tenant to pay the interest on incumbrances existing at the time the tenancy was created. A dowress forms no exception to the rule. 4 Kent, Comm. 74; House v. House, 10 Paige, 158. In the case before us the entire real estate was mortgaged. One-third of it was assigned to the complainant as her dower, burdened with one-third of the entire mortgage debt. The mortgage was past due. If we adopt the complainant's view, she can recover the entire amount of the mortgage against the remainder-man, and her estate will be enlarged to the extent of the payment. In that event the land in which she was endowed would be worth about $4,400, instead of $3,100, which was the value assigned to her. Such holding would be not only contrary to law, but to equity as well. Whether the life tenant or the remainder-man redeems or takes an assignment of the mortgage, each must contribute to the payment of the principal according to the value of his interest. Much conflict formerly existed among the authorities upon this point, but the well-settled rule now is that the dowress must pay the present value of an annuity based upon the annual interest which the law requires her to pay. The rule is thus stated in an early and leading case: "How is the plaintiff [a dowress] to contribute ratably to discharge the mortgage debt? If she was to pay one-third of the debt and interest (exclusively of costs) paid by the defendant, together with interest on that one-third from the time the defendant paid it, there can be no doubt that this would be, to the defendant, a satisfactory contribution. But the plaintiff has only a life interest in the dower, and payment of the entire one-third of that debt would be unjust. It would be making her pay for a life estate equally as if it was an estate in fee. The more accurate rule would appear to be that she should 'keep down' one-third of the interest of the mortgage debt, by paying, during her life, to the defendant, the interest of one third part of the aggregate amount of the principal and interest of the mortgage debt paid by the defendant, to be computed from the date of such payment. But, as it would be inconvenient and embarrassing to charge her with such an annuity, then let the value of such annuity from the plaintiff (her age and health considered) be ascertained by one of the masters of the court, and be deducted from the amount of the rents and profits so coming to her; and, if that value should exceed the amount of the rents and profits so coming to her, that then the residue of such value be deducted from the dower to be assigned to her, out of the house and land mentioned in the bill. The question is, if an estate in fee in one equal third part of the premises ought to pay the one equal third part of the mortgage debt and interest paid by the defendant, then what proportion ought the plaintiff's life estate in that one third part to pay? I apprehend the value of such an annuity would be that result." Swaine v. Perine, 5 Johns Ch. 482. In chapter 24, Scrib. Dower, the subject will be found very fully and ably discussed, and the authorities fully cited.

This annuity cannot, however, be based upon the rate of interest contained in the mortgage, but must be based upon the legal rate of interest at the time the first decree is rendered. The contest is no longer between the mortgagee and those whose duty it is to pay, but between the latter, who are required to contribute, and as between whom there is no agreement to be bound by the rate fixed in the mortgage. Their relation is none other than that where one pays money for the benefit of another without any agreement as to the rate of interest, the legal rate of interest (6 per cent.) must control. The decree will be reversed, with costs, and the case remanded to the court below, with instructions to enter a final decree in accordance with this opinion. The other justices concurred.

MOORE v. HARRIS et al.

(4 S. W. 439, 91 Mo. 616.)

Supreme Court of Missouri. May 16, 1887.

Error to circuit court, Scott county

Wilson Arnold and D. H. McIntyre, for plaintiff in error. L. Brown, for defendants in error.

SHERWOOD, J. Ejectment for lot 63 in the town of Benton. Both parties claim under Elizabeth Crow, as the common source of title. To show title in himself, the plaintiff, after showing title in Albion Crow, the husband of Elizabeth Crow, by a commissioner's deed, dated October 28, 1845, next offered in evidence a deed from the collector of Scott county, Thomas S. Rhoades, to Elizabeth Crow, dated October 28, 1867, professing to convey to the grantee therein the lot in controversy, as the property of Albion Crow, and as sold because of delinquent taxes.

Plaintiff next offered in evidence a deed for the lot in question, from Elizabeth Crow to himself, dated March 25, 1868, which deed, so far as necessary to copy it here, is as follows: "Know all men by these presents, that I, Elizabeth Crow, of the county of Scott and state of Missouri, have this day, for and in consideration of the sum of seven hundred dollars, to me in hand paid by Joseph H. Moore, of the same county and state, granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Joseph H. Moore the following described real estate, situate in the county of Scott and state of Missouri; that is to say, the south-east quarter of the north-east quarter of sec. 14, and the undivided half interest in the west half of the south-west quarter of sec. 12, in township 28 north, range 13 east, it being 40 and undivided half of 80 acres. Also, all the right, title, and interest which I have of, in, and to lots 91 and 121, in the town of Commerce, in said county of Scott; and also lot sixty-three, in the town of Benton, in said county of Scott."

The next link in the chain of plaintiff's title was a deed to Elizabeth Crow, acknowledged October 29, 1870, executed by plaintiff as administrator of Albion Crow, and conveying the lot in question.

The claim of the defendant Harris is based on a warranty deed for the lot aforesaid, executed November 30, 1877, by Elizabeth Crow to Mary J. Harris, wife of said defendant Harris.

1. The deed of the collector of Scott county for the lot in dispute, executed to Elizabeth Crow in 1867, was worthless, and conveyed no title, and was void on its face, in consequence of its failing affirmatively to show that all the prerequisites which the law had prescribed, as to the fact of notice having been given of the delinquency of the land for taxes, had been complied with prior to judgment rendered by the county court; and in consequence of its failing affirmatively to show that advertisement had been made of the intended sale of the land for taxes in the precise method required by the statute. The statements made by the collector in his deed, that these things—these jurisdictional facts—had been done "according to law," or "in manner and form as directed by law," go for nothing in the estimation of the courts. The facts done must, in such cases, be set forth, in order that the courts may determine whether the respective officers and courts have acted "according to law." Lagroue v. Rains, 48 Mo. 536; Spurlock v. Allen, 49 Mo. 178; Large v. Fisher, Id. 307.

The bill of exceptions shows that this deed was admitted in evidence, despite the objections of the defendants. The judgment for plaintiff, however, recites that it was finally excluded from the consideration of the jury, by order of the court. This recital, if true, should have been preserved by the bill of exceptions, the office of which is to preserve all matters of mere exception. I judge, however, from the first instruction asked by, and refused, the defendants, that the court did not regard the collector's deed as void on its face. It was thus void, as already seen from the authorities cited, and no title passed to Elizabeth Crow by reason thereof.

2. I now come to consider the effect of the deed to plaintiff of date March 25, 1868, whose recitals have already been in substance set forth; for on this deed plaintiff's paper title exclusively depends. I think it quite too plain for argument that the statutory covenants of "grant, bargain, and sell" do not extend to nor include the lot in question. If this be true, then the deed just mentioned, so far as concerns lot 63, is in effect a bare quitclaim deed, and no after-acquired title of Elizabeth Crow could inure to the benefit of plaintiff. Besides, it already appears that at the time the deed of March 25, 1868, was made, the only title Elizabeth Crow had in the premises was that of a dowress, whose dower remains unassigned. The authorities agree that in such case, that the legal title of a dowress does not pass by her deed. The only right or interest thereby passing is one which may be enforced and effectuated in equity. 1 Washb. Real Prop. (4th Ed.) 303; 2 Scrib. Dower, 40, 43. Of course these remarks are not intended to apply to the case of a dowress who releases her dower right to the terre-tenant, or one in possession of the lands, or to whom she stands in privity of estate. Washb. supra; Scrib. Dower, 40.

The only right of interest, therefore, which plaintiff acquired by reason of his deed, as aforesaid, was one vesting in action only, so far as the views of a court of law are concerned. What a court of equity would do in the premises does not matter, as in

this action the plaintiff must recover on the legal title, and not on uneffectuated equities.

3. Nor did the plaintiff gain any title to the premises by reason of the operation of the statute of limitations, since his possession was not adverse and continuous for the requisite statutory period. Wilson v. Albert, 89 Mo. 537, 1 S. W. 209.

As this cause was not tried in conformity to the views here announced, the judgment is reversed, and the cause remanded.

All concur.

FREE et al. v. BEATLEY.

(54 N. W. 910, 95 Mich. 426.)

Supreme Court of Michigan. April 21, 1893.

Appeal from circuit court, Van Buren county, in chancery; George M. Buck, Judge.

Suit by John W. Free and Mulford D. Buskirk against Martha B. Beatley to remove cloud on title. A decree was entered in favor of complainants, and defendant appeals. Affirmed.

Osborn & Mills, for appellant. Crane & Breck, for appellees.

GRANT, J. The land in which defendant now claims the right of dower was sold under the decree of this court in Killefer v. McLain, 78 Mich. 249, 44 N. W. Rep. 405, and was bid in by the complainant Free. The sale was confirmed, and the commissioner's deed executed to Free, who subsequently deeded a half interest therein to his co-complainant. Complainants went into possession, and, subsequently learning that defendant claimed an interest in the land, filed their bill to remove the cloud from their title. The facts necessary to a determination of the question are these: Defendant's former husband, Mr. Nash, was the owner in fee of the land here in controversy, upon which was a water-power saw and stave mill. One Briggs was also the owner in fee of adjoining lands, upon which were a water power and grist mill. These properties were of about equal value. January 2, 1882, Briggs and Nash entered into a copartnership agreement, by which they united these two properties, and agreed to carry on the entire business as copartners. After specifying the character of the business to be carried on, the written agreement stated as follows: "For that purpose we do agree and hereby actually put into the said business the grist and flouring mills now owned by said Briggs, * * * known as the 'Central Mills,' and the realty, machinery, and attachments thereto, and the property known as 'Nash's Stave and Heading Factory and Sawmill,' and the machinery in the same connected therewith, and also two hundred and forty acres of land owned by said Nash; * * * each of said parties to quitclaim to the other one equal undivided half of the lands and property above described belonging to each, so that the title to said property shall be vested in said parties jointly." Pursuant to this agreement, deeds were executed and exchanged upon the same day, in the execution of which their wives respectively joined. Defendant understood the entire transaction, and the purpose for which these deeds were executed. The partnership was dissolved by the death of Nash. Briggs still continued to carry on the business until his death. Subsequently his executors filed a bill in chancery for an accounting, for a sale of the partnership assets, and for a division of the surplus, if any remained. Killefer v. McLain, 70 Mich. 508, 38 N. W. Rep. 455. The court there held that the whole of the real estate was put into the firm, and constituted firm assets. Defendant was made a party defendant to that suit. She made no defense, and as to her the bill was taken as confessed. She was appointed guardian ad litem for her infant child in that suit, and was a witness.

1. By the agreement of copartnership, and the deeds executed pursuant thereto, the entire land of Briggs and Nash became partnership property. The wife of each thereby became entitled to dower in the entire land after the payment of the partnership debts. The entire land was used and treated as partnership property. The defendant so understood it, for she testified on the hearing in the other suit that she understood that she and her child were entitled to half of the mill property.

2. She was made a party to the former suit. If she claimed any interest in the land it was then her duty to assert it, and have that interest determined. The sole object in making her a party was to ascertain her rights therein, if she claimed any. The court expressly determined and decreed that the land was a part of the firm assets. Free, the purchaser, therefore had the right to assume that she neither claimed nor had any interest in the property except that arising from partnership relations. Even had she then been possessed of any right of dower independent of the partnership, she must be held estopped from now asserting it, because she did not assert it when she had the opportunity to do so. She was a proper party to the suit, because she had a contingent right of dower in the property. Free was an innocent purchaser, and he and his grantees will be protected. He purchased in reliance upon a decree rendered in a suit wherein all persons interested in the property were parties, and which was brought for the express purpose of adjudicating and determining all their rights. Decree affirmed, with costs. The other justices concurred.

McKELVEY v. McKELVEY.

(70 N. W. 582.)

Supreme Court of Michigan. April 6, 1897.

Appeal from circuit court, Barry county, in chancery; George M. Buck, Judge.

Bill by Johnson McKelvey, by George O. Dean, his general guardian, against Kate McKelvey, for an injunction. From a decree for plaintiff, defendant appeals. Affirmed.

Walter S. Powers, for appellant. Philip T. Colgrove, for appellee.

HOOKER, J. The defendant, a young woman, married Johnson McKelvey some years ago. At that time he was possessed of considerable property, and was quite old, and at his request she deeded to him her dower interest in 40 acres of land. Subsequently she filed a bill for divorce and alimony, and prayed that he might be required to deed to her the premises mentioned. Arrangements were made whereby she agreed to accept a deed of said parcel and $35 in cash in lieu of all interest in his estate. It took the form of a stipulation, and, although dower was not specifically mentioned, it provided that such payment and conveyance should be in full for all expenses and alimony against him. The complainant's testimony shows that she understood that it was in full settlement of all claims upon him. That also appears from the testimony of other witnesses. She afterwards brought ejectment to recover dower in the lands of McKelvey, and this bill is filed to restrain such suit. The circuit judge granted the prayer of the bill, and an examination of the testimony satisfies us of the propriety of his decree. The case is within the rule of Owen v. Yale, 75 Mich. 256, 42 N. W. 817, and Adams v. Story, 135 Ill. 448, 26 N. E. 582. The decree is affirmed, with costs of both courts. The other justices concurred.

BLACK et al. v. SINGLEY.

(51 N. W. 704, 91 Mich. 50.)

Supreme Court of Michigan. March 18, 1892.

Error to circuit court, St. Joseph county; Noah P. Loveridge, Judge.

Ejectment by Sarah E. Black and others against John Singley. Defendant had judgment, and plaintiffs bring error. Reversed, and judgment entered for plaintiffs.

Howell, Carr & Barnard, for appellants. R. R. Pealer and G. P. Doan, for appellee.

McGRATH, J. This is ejectment by the heirs of Eliza Dickinson, claiming under a deed from Abner Moore, executed in 1852. Eliza Dickinson gave back a life lease. Moore died in 1869, leaving defendant in possession, and this suit was commenced in 1870. Moore's wife died some time between 1855 and 1857. Moore came to Michigan some time in 1834, leaving his wife and four children in Pennsylvania. Two of the children came to Michigan and lived for a time with Moore, but the wife never came, and never resided in Michigan; nor is there any evidence that any correspondence ever passed between husband and wife; nor does it appear that Moore ever returned to Pennsylvania, even to attend his wife's funeral. One witness who knew the family in Pennsylvania, and had removed to Michigan, and lived in the neighborhood, says that in 1842 or 1843 Moore said to him that "when he got ready and means he expected to fetch his family out." Other witnesses say that in 1844 and 1845, and again in 1858, 1859, and 1860, Moore said that he had left Pennsylvania with the intention of never living with her; that he could not live with her there, and would not here. There is no evidence that his wife ever expected or intended to live in Michigan. Eliza Dickinson lived with Moore as his housekeeper from 1847 to 1867. The consideration named in the deed is $800. The trial court instructed the jury as follows: "It is conceded, gentlemen, by the evidence, that this wife never lived in the state of Michigan, but that she lived in the state of Pennsylvania. Now, the question which I submit to you is whether this forty acres of land in question was, at the time it was conveyed or attempted to be conveyed to Eliza Dickinson, the homestead of Abner Moore, and whether he intended it as his home. If you find that it was his homestead, and that he intended that forty acres of land for his home, then I instruct you that your verdict must be for the defendant. * * * The plaintiffs claim that this was not the homestead of Abner Moore; that he did not intend it for a home; that he was not living with his wife, and did not intend to live with her, but that he had abandoned her when he came from Pennsylvania here; and that he did not regard it as a homestead. On the other hand, the defendants contend that he came to the state in 1834, and some years afterwards he went on this piece of land, then in a wild state, and improved and put buildings upon it, and intended to make it his home. The evidence which was admitted—and there was some of it given on both sides as to whether he intended to bring his wife here—may be taken into consideration by you upon this question as to whether he intended to make this forty acres his home. The defendants, as I have stated to you, allege that this was his homestead; that he intended to make it his homestead; and any attempted alienation of it without the signature of his wife to the deed of alienation would render that deed to Mrs. Dickinson void. I instruct you that the burden of proof would be upon the defendants to show that this was a homestead, and intended by Abner Moore to be his home, because that is the defense they set up as against this ownership by Abner Moore and the conveyance to Eliza Dickinson. * * * If you find that he was a married man at the time he alienated it, or attempted to alienate it, to Eliza Dickinson, and intended it for a homestead, then I instruct you that the deed to Eliza Dickinson would be void, because his wife, notwithstanding she was not domiciled in this state, but in the state of Pennsylvania, did not join him in the deed. If you so find that this was his homestead, and he intended it to be at this time, then, as I instructed you before, your verdict shall be for the defendant. If you find it was not a homestead, that it was not intended by him to be a homestead, at the time he made the deed to Eliza Dickinson, then I instruct you that you would convey a good title, and that these plaintiffs would be entitled to recover." Under these instructions the jury found for defendant, and plaintiffs appeal.

The instructions were clearly erroneous. The case is ruled by Stanton v. Hitchcock, 64 Mich. 316, 31 N. W. 395. Eliza Dickinson was a bona fide purchaser for value. In view of the conveyance to her, it cannot be claimed that Moore intended to assert or preserve his wife's homestead rights in these premises. As is said in the case cited: "Under our legal regulations, no imaginary or imputed intention can supplant the actual intent. It would be little short of absurdity to hold that Hitchcock could at the same time contemplate the occupancy of the house as the home of his second wife and also of the first." "The object of the constitution is not ambiguous. It is to protect that dwelling which has been the actual home of the family from such disturbance as will make them lose its enjoyment. It is confined, by its language, to the property actually occupied as a homestead by a resident of Michigan; and, if the owner has a family, it is the actual home of that family which is protected from seizure by creditors. There is nothing in the statute which contemplates that a wife who has never lived on the prem-

ises, or claimed to live there, may, after her husband's death, claim such an interest by relation as will avoid his dealings with property which he never meant should be the home of the absentee, however much he may have wronged her. The statute which, after a husband's death, secures rights to a widow, is confined expressly to resident widows." "The first wife never contemplated it as her and her husband's joint home. * * * It must be remembered, not only that the character of any property as a homestead depends on intention, but that it may be entirely destroyed by a removal of residence. There is nothing in the law to prevent such removal at any time, and after it the property stands, like any other property, liable to sale or any other disposal by the owner at his pleasure. Under our laws, the sale by a husband whose wife is non-resident carries the property free from any right of dower. Actual non-residence in such case, in spite of the marital relations, cuts off any control over the sale of a complete title. * * * The law would be grossly tyrannical if it ties the husband's hands in the one case at least, and it cannot be possible that such consequences could have been designed by the constitution. It was designed to protect those who had subjected themselves to its laws, and acted in reliance on them, but not to treat as homes what are not homes, or give powers to non-residents which could not, under any circumstances, be of any use to them personally." The husband and wife, living separate and apart under circumstances such as these, might each claim a homestead, the one in Pennsylvania and the other in Michigan, but neither could claim both. Plaintiffs were entitled to judgment. The judgment is therefore reversed, and judgment entered here for plaintiffs, with costs of both courts, and the record remanded. The other justices concurred.

HOFFMAN v. BUSCHMAN et al.

(55 N. W. 458, 95 Mich. 538.)

Supreme Court of Michigan. May 31, 1893.

Error to circuit court, St. Clair county; William T. Mitchell, Judge.

Ejectment by John M. Hoffman against Bernard Buschman, Carsten Buschman, and Henry Ahrens. There was a judgment in plaintiff's favor, and defendants bring error. Affirmed.

James L. Coe, for appellants. Charles K. Dodge, for appellee.

HOOKER, C. J. Plaintiff brought ejectment to obtain possession of the undivided half of certain lands, described as follows, viz.: "The southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter, of section thirty-four, town seven north, range sixteen east." The case was tried without a jury, and a written finding of fact and law was filed. The brief of counsel for the appellants relies upon two points to reverse the judgment, viz.: First. The wife of Bernard Buschman was not made a party. Second. The sale under the execution, upon which plaintiff claims title, was void. Exceptions upon each of the findings of fact and law were filed. The findings of fact cannot be disturbed, for the reason that the record does not show that all of the testimony taken upon the trial was included.

The court found that the premises were owned in common by Bernard Buschman and Carsten Buschman; "that, at the time of the commencement of the action, defendant Ahrens was in possession of the whole of said premises, under and as the tenant of said Bernard and Carsten Buschman; * * * that, for some time previous, and up to the year 1884, said Bernard, with his wife and family, lived upon said lands, but in that year he removed therefrom to the city of Port Huron, where he, with his wife and family, have since lived, and where he votes and claims his residence; but that he left some of his household effects on the lands claimed, and has, with said Carsten, occupied as a tenant." Under this finding it is claimed that the defendant Bernard and his wife should be found to have homestead rights in the west 40 acres. That these parties lived somewhere upon the premises, and had homestead rights in some part thereof, up to April, 1884, is clear; but, at the time of this levy and sale, they had lived in Port Huron for upward of five years. When ejectment was brought, Bernard asserted homestead rights in himself and wife. The burden of proving this right is upon the defendant. Amphlet v. Hibbard, 29 Mich. 298. The retention of homestead rights, though the party live elsewhere temporarily, is possible. It is largely a matter of continuing intent, and is a fact to be proved like any other fact. There is nothing in the finding that shows the existence of such intent, but, on the contrary, all facts found are inconsistent with such design, and, in the absence of any other facts, justify the finding of law that the homestead was abandoned.

Plaintiff derived title through an execution sale upon a transcript judgment. The proceedings are conceded to have been regular, with two exceptions. The description in the levy was as follows, viz.: "The undivided one-half of the following described land, to wit: The southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter." In the subsequent proceedings the description was as follows, viz.: "The undivided one-half of the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter;" these proceedings showing that the interest of Bernard Buschman was involved. We think there is no room for question over these descriptions, which are identical, and could not mislead any one.

A further point is made over the sale, the land having been sold as one parcel, which counsel for defendants claim was in violation of How. St. §§ 6116, 6117. If two contiguous 40-acre parcels, separated by a quarter line, and occupied as one farm, can be considered within the prohibition of the statute, such sale was an irregularity, and cannot be questioned in an action of ejectment. Cavenaugh v. Jakeway, Walk. (Mich.) 344, and cases cited; Blair v. Compton, 33 Mich. 423; Campau v. Godfry, 18 Mich. 45. The judgment must be affirmed. The other justices concurred.

MYERS v. WEAVER et al.

(59 N. W. 810, 101 Mich. 477.)

Supreme Court of Michigan. July 10, 1894.

Appeal from circuit court, Kalamazoo county, in chancery; George M. Buck, Judge.

Bill by Nellie J. Myers against Charles V. Weaver and another to remove a cloud from title. Judgment for defendants, and plaintiff appeals. Reversed.

Volney H. Lockwood, for appellant. Adelbert D. Harris (Alfred S. Frost, of counsel), for appellees.

McGRATH, C. J. Complainant's husband, in July, 1892, sold a house and lot which had been occupied as a homestead, and bought an adjoining lot, the title to which was placed in complainant. A suit was commenced against complainant and her husband in November, 1892, resulting in a judgment by default in December, 1892, upon a promissory note, given in July, 1891, for a debt of the husband's. A levy was made upon complainant's lot. This bill is filed to remove the cloud, and alleges that the lot levied upon was bought for use as a homestead. The lot was not built upon at the time of the levy, and the sole question is whether it was bought and held for that purpose. It appears that complainant's husband, John Myers, had in 1888 conveyed to defendant Weaver a certain other lot, and some time afterwards Weaver claimed that Myers had, at the time of the conveyance, misrepresented the amount of a mortgage subject to which the conveyance was made. Myers insisted that there was no misrepresentation, but that the amount of the mortgage was correctly given, and that he had agreed at the time of the conveyance to reduce it by payment. In July, 1891, Myers and complainant joined in a note to Weaver for the difference, and assigned to him as collateral a certain mortgage, which was held by complainant and her husband against a farm which they had owned, and sold in November, 1888. The mortgage so assigned was subject to other mortgages, and, at the time of the assignment, a prior mortgage was in process of foreclosure. The farm was subsequently sold in that proceeding, and brought less than the amount of the prior mortgage. The written opinion of the trial court appears in defendants' brief, from which it is clear that the circumstances connected with the sale of the lot to Weaver, and the subsequent assignment of the mortgaged security, were relied upon as affecting the credit given to the testimony of the complainant and her husband.

We do not find in the record any reason for discrediting complainant's testimony. It is conceded that the lot sold to Tittle was the homestead. The title to the lot sold to Weaver was in John Myers. Complainant is not connected with any misrepresentations made respecting the mortgage, and it does not appear that she knew anything about the amount thereof. She received no part of the proceeds of that sale, nor is she connected with any representations made concerning the mortgage that was assigned as collateral to the note sued upon. It appears that the house and lot sold to Tittle were incumbered for $900; that the purpose of the sale was to obtain relief from that incumbrance, and get a cheaper home; that the intention was to build and occupy a house upon the lot in question; that, before the suit upon the note was brought, the location of the house had been staked out, stone had been drawn upon the lot for use in construction of the cellar, a party had been engaged to excavate, and negotiations had been had with a builder relative to the construction of the house, and there is evidence that the contract had been actually prepared. Respecting these matters, complainant's testimony is corroborated by witnesses other than the husband. A real-estate agent testified that he was told by Myers at one time that they desired to sell the lot, but the same witness testifies that Myers told him at the same time "that he was at work at the paper mill; that it was going to be a ways for him to go over there, and he made up his mind he would sell it, and buy over there, or build, or something of that kind." The attorney who had the note in his hands for collection says that, a short time before the suit was brought, he saw complainant, and had a conversation with her respecting the payment of the note, in which he asked her how she came to buy the lot, and she replied that she bought it for speculation; that he then asked her what she was going to do with it, and she replied that, if she got a chance, she would sell it; "and I even went so far as to ask her if she was going to build upon it, and she said she was not." Complainant denies that she made these statements. The clear weight of testimony is, however, in favor of complainant. The testimony of several witnesses, other than the parties in interest, as to things actually done upon the lot some time before the commencement of suit, tends strongly to corroborate the complainant's contention that the lot was held for use as a homestead. The decree below is therefore reversed, and a decree entered here for complainant. The other justices concurred.

HITCHCOCK v. MISNER et al.

(69 N. W. 226.)

Supreme Court of Michigan. Dec. 18, 1896.

Appeal from circuit court, Muskegon county, in chancery; Fred J. Russell, Judge.

Bill by Joseph A. Hitchcock against Porter P. Misner and others to set aside an attachment levy. There was decree for complainant, and defendants appeal. Affirmed.

Brown & Lovelace, for appellants. Nelson De Long, for appellee.

MOORE, J. This is a proceeding to set aside an attachment levy made by defendants upon one-half of a city lot in Muskegon. The record shows that the attachment was made October 5, 1895, by creditors of a firm of which complainant was a member. This half lot, which was known as "No. 12 Muskegon Avenue," was bought by complainant, who was then a married man, in 1890. It was occupied by himself and family for about 3½ years. About a year and a half before the levy, complainant and his family moved to No. 53 Muskegon avenue, into a house then occupied by his father and his family, and continued to reside there until after the levy upon the property at No. 12 Muskegon avenue was made. At the time complainant moved to No. 53 Muskegon avenue, his father deeded the property located there to him. There was a mortgage upon the property of about $800, and some back taxes. It is the claim of complainant that he never intended to abandon his homestead at No. 12, but that he and his family always regarded it as his homestead; that he moved to No. 53 to enable him to care for his father, who was very old,—the house at No. 12 not being large enough to accommodate both families. It is also his claim that, when No. 53 was deeded to him, his father was not able to pay the mortgage and taxes, and was afraid he would lose the property. He also claims that the arrangement between his father and himself at the time of the making of the deed was that the complainant should pay the mortgage and taxes, and that, when he could sell the property without sacrificing it, he was to do so, and, after reimbursing himself, was to pay the surplus to his father; that he expected to make the sale, and to carry out his agreement. It was the claim of the defendants that, when complainant moved to No. 53 Muskegon avenue, he intended to abandon his home at No. 12 Muskegon avenue, and that his return to No. 12 was because he was afraid that his creditors would levy upon it, and was for the purpose of defrauding his creditors, and that by giving mortgages to his mother-in-law upon both pieces of property for an amount largely in excess of his debt to her, which mortgages were signed by complainant's wife, he has shown his purpose to defraud his creditors, and that these acts of the complainant and his wife characterize them as persons whose testimony ought not to be believed. The case was tried in open court, and the circuit judge granted a decree according to the prayer of the bill. The complainant, his wife, and his father all gave testimony tending to establish the truth of complainant's claim. The defendants controverted this testimony.

In Hoffman v. Buschman, 95 Mich. 539, 55 N. W. 458, Justice Hooker held that "the retention of homestead rights, though the party live elsewhere temporarily, is possible. It is largely a matter of continuing intent, and is a fact to be proved like any other fact." In Kaeding v. Joachimsthal, 98 Mich. 78, 56 N. W. 1101, it was held, in a case where the parties had been absent from the homestead six years, that, where there was a continuing intent to return to their home after the object of their temporary absence should have been attained, such intent, if it existed, protected the homestead. These cases are collated in the decision just quoted. See, also, the case of Myers v. Weaver, 101 Mich. 477, 59 N. W. 810. The circuit judge had the witnesses before him. While there were some things done by the complainant, in his effort to keep his creditors from reaching his property, that are open to criticism, we are not inclined to say that the conclusion of the circuit judge that the property was exempt from levy is erroneous. The decree is affirmed, with costs. The other justices concurred.

CARUTHERS et al. v. CARUTHERS.

(4 Brown, C. C. 500.)

Court of Chancery. 1794.

Mr. Graham and Mr. Stratford, for plaintiffs. Mr. Lloyd and Mr. Agar, for defendant.

ARDEN, M. R. This is a case of great importance. The prayer of the bill is, that the defendant, the widow, may be declared not to be entitled to any right of dower, or free bench, or thirds of the personal estate of the intestate, her husband, but to be debarred of the same by the provision made her by the settlements, on the marriage; and the case is this:

Previous to the marriage of the intestate with the defendant, who was an infant of the age of seventeen, a certain estate which was in the possession of his mother was settled on the mother for life, remainder to the husband for life, remainder, if she should survive the mother and husband, to the intended wife for life, as part of the jointure and provision intended to be made and secured for her, and in lieu, bar, recompense, and full satisfaction of all demands, or thirds at common law, or by custom or otherwise, of all and every the messuages, &c., as the husband might during the coverture be seised of. "No notice is taken in this settlement what was to be the other part of the jointure or provision to be made for her; but also before the marriage, Thomas Palling, who was the uncle of the husband, made a surrender of copyhold, which was recited to be for making some further provision for the marriage, which was to the use of himself for life, remainder to the husband for life, remainder to the wife for life, if she should so long continue a widow. It does not state it to be in bar of dower, but it is impossible not to see, that it was that further provision which was referred to in the former deed; and the question is, whether she is not bound to take these provisions in bar of dower.

The husband afterwards acquired a larger copyhold estate, in which, by the custom of the manor, she takes the whole for life.

It is contended, that by the case of Drury v. Drury, or Drury v. The Earl of Bucks (by which name it is reported in 5 Brown, Parl. Cas.), this principle has been determined, that an infant is bound at law by a jointure, and in equity will be bound by any covenant for securing a jointure, or by any collateral satisfaction, whether the same be of freehold or not: that the law has given guardians authority to bind infants by such a settlement.

To the propositions thus largely laid down, I acknowledge I must make some objection. 2 Macph. Inf. (London Ed.) 523, 524.

It is said, that great judges have laid it down, that by such a settlement, made during the infancy of a female infant, her own estate would be bound, and for this Cannel v. Buckle, 2 P. Wms. 242, and Harvey v. Ashley, 3 Atk. 607, have been cited.

But in those cases this was not the point decided, although something like the principle is laid down, and it appears to have been the opinion of those judges, that such was the power of guardians, and that, having the power of marrying their wards, they must have that of making the collateral contracts.

But I hardly think it probable that Lord Hardwicke laid it down so broadly. It is impossible to apply the principle more strongly as to a female than to a male infant, and as to male infants no such doctrine has been laid down. There has been no such decision, nor was that proposition insisted on in Drury v. Drury.

In Durnford v. Lane, 1 Brown, C. C. 106, the principle came in question; that was a new case; the husband there was an adult, the wife was an infant. It was an attempt to bind the estate of the wife. Lord Thurlow had great doubts upon the subject. He held the husband bound by his own covenant, leaving the question open, how far it bound the wife.

But there is a case in which the question came directly before the court. It is Clough v. Clough, in Mr. Wooddeson's Systematic View (volume 3, p. 453, note). It was to carry into effect a settlement made before marriage of the widow, Patty Clough, while she was an infant. The decree declared that her estate was not bound by the marriage articles, and the bill was dismissed; that is an express decision by Lord Thurlow, that the contracts of male and female infants do not bind their estates, and though that is not a case of dower, it has weight in this case, and though it has not the sanction of the house of lords, it is the opinion of a great judge.

The only question then is, whether the case of dower be an exception to the general rule.

It is said, the case of Drury v. Drury is decisive, and that no judge ought to set up his private opinion against it.

The fair question is, what is decided by that case?

It may be said that no judge should contradict that case, but that it will only apply where exactly the same case occurs.

But I shall always hold myself bound, when I find a case so determined, not only by the case itself, but by all the principles which necessarily apply to it. I hold it a duty of a judge, where he finds a case determined by the house of lords, to hold himself bound by all the principles which were necessary to its determination.

What was the question there? Lord Northington, when the case was before him, was of opinion that a jointure at law, though accompanied with every requisite of a jointure, would not bind an infant. And, 2dly, that a covenant to pay the wife an annuity of £600 a year, not out of particular lands, would not bind her: from this decree the cause went to the house of lords. The first question on the point of law was put to the judges; the next question was, whether an equitable jointure would bind the infant. It was held that a jointure at law would bind, and that a cove-

nant would be held equivalent in this court, though no particular lands were specified; because, it was said, it amounted to the same thing; for if there were no lands, it would be the same thing as if it was out of particular lands, and they were executed, then the wife would be entitled to her dower. So that she would have the jointure or the dower. In that case the settlement extended to settle her real estate, but there was no question or decision upon that. The house ordered a part of the personal estate to be set apart, to pay the annuity, but the widow would have had a right to have had the provision made in land, and the house of lords would have ordered lands to be set out, if she had pressed it.

All the determination therefore in that case, is, that where the provision is made as effectual as if it was set out, it will be sufficient, though it is not so.

There was no question arose on that case, on the subject of election.

By the common law, upon the marriage, the wife acquires a right to dower in the freehold, and a customary share in the copyhold estates of the husband, or a provision from the husband under the statute.

It is said, that guardians have a power to bind the right of the infant, but I think Drury v. Drury did not mean to decide that. If the provision had not been certain, or if she was only to take upon a remote contingency.

Before I perform an agreement, I must see that it is reasonable.

Then, what is a jointure? Lord Coke defines it: "It is a competent livelihood of freehold, for the wife, to take effect immediately after the death of the husband, for the life of the wife." Vernon's Case, 4 Coke, 2.

I wish to know, what fair conclusion can be drawn from Drury v. Drury that there is any equity by which a woman would be obliged to take an uncertain interest in bar of dower. Here, non constat that one of the estates will ever be hers in possession; the other has fallen in, if she chooses to take it.

Suppose she had had a jointure which turned out to be bad, I mean, which would not have afforded her the same advantage which she would have had from her dower, would that have bound her?

In Drury v. Drury she had as certain a provision as in her dower; therefore, I think Drury v. Drury decides, that where the provision is equally certain with the dower, it is good.

Would she have been bound by this in her husband's lifetime, whilst both the tenants for life were alive? If it is good at all, it must be so from the making of the settlement; but she could not be bound then.

Any equitable provision which a woman takes, must be as certain a provision as her dower, not an uncertain provision which she may never enjoy.

I do not say that if she had been adult, she might not have bound herself. She might have taken a provision out of the personal estate, or she might even have taken a chance, in satisfaction for her dower, acting with her eyes open; but an infant is not bound by a precarious interest.

Lord Thurlow, in Durnford v. Lane, supra, and in Williams v. Williams (1 Brown, C. C. 152), held, that a settlement to bind an infant must be reasonable. This is not such an agreement as a court of equity can call upon her to confirm. The guardian is incautious where he attempts to bind the infant by a precarious provision.

Declare her not bound by the settlements, and to be at liberty to make her election, to take the provisions made for her, or to take her dower and free bench, waiving the provisions; it being signified, that she consented to take the dower and free bench.

The eldest son, as he suffers by her taking her dower and free bench, must have amends made to him by the copyhold estate settled by Palling.

Referred it to the master, to take an account of the value of the freehold and copyhold estates, and reserved further directions till after the account taken.

TAYLOR et al. v. TAYLOR.

(33 N. E. 532, 144 Ill. 436.)

Supreme Court of Illinois. Jan. 19, 1893.

Appeal from circuit court, Peoria county; T. M. Shaw, Judge.

Bill by Armenia J. Taylor against Charles E. Taylor and others for assignment of dower. Complainant obtained a decree. Defendants appeal. Affirmed.

Armenia J. Taylor, widow of Burtis S. Taylor, late of Peoria county, deceased, filed her bill in the circuit court of that county for the assignment of dower in lands whereof he died seised. The heirs at law of Burtis S. Taylor were made defendants, and they answered, denying that the complainant was ever entitled to dower in the lands whereof Burtis S. Taylor died seised, because, before her marriage with him, they entered into an agreement as follows: "This agreement, made and entered into this 18th day of October, 1883, between Burtis S. Taylor, of Princeville, Peoria county, state of Illinois, party of the first part, and Armenia Pardee, of the city of New York, state of New York, party of the second part, witnesseth that, whereas, a marriage is about to be had and solemnized between the said parties, and the said parties are desirous of making a settlement of their property, both real and personal, prior to said event, it is agreed between the parties that said party of the first part is to provide for the said party of the second part all the necessaries of life, including medical care and nursing during sickness, in all cases to support and care for her in such manner as his means will permit, during his life, and should she, the party of the second part, survive the party of the first part, then and in that case the estate of the said party of the first part shall pay the party of the second part the sum of two thousand ($2,000) dollars in full payment and discharge of any and all claims she may have to dower in the real estate of the said party of the first part, or specific allowance as his widow, or interest or share she may have in his personal property, and is to be received by her in full discharge of any and all such claims, dues, or demands whatever. It is further agreed between the parties that said party of the first part shall hold any and all of his real estate during the time of their married life, free and clear of any incumbrance or dower or homestead of the party of the second part, and, should it become necessary in the transaction of business for the party of the first part to sell or dispose of any of the real estate now owned by him, or which he may hereafter purchase, the party of the second part hereby agrees to sign all deeds relinquishing all right of dower and homestead she may have in and to any and all such real estate, meaning and intending by this agreement that each shall have and hold any real estate that they may have or own at the time said marriage is solemnized, or which either may subsequently purchase or obtain during said marriage, free and clear from the claims or control of each other, and to be owned and controlled in the same manner as though no marriage relations existed between the said parties. It is further agreed between the parties that, should said party of the second part wish to dispose of any real estate which she may own at the time of said marriage, or which she may subsequently obtain by purchase, devise, or otherwise, the party of the first part hereby agrees to sign any and all deeds of conveyance, thereby relinquishing any and all rights he may have to dower or homestead in and to said real estate. It is further agreed between the parties hereto that, should any children be born of said marriage, and survive the party of the first part, that said issue shall inherit all the estate of the party of the first part, equally with any issue the party of the first part may have from former marriage or marriages, the same as if no contract existed between the parents. It is further agreed between the parties that, should the party of the second part survive the party of the first part, the payment to her of the sum of two thousand ($2,000) dollars shall be made within two (2) years from the decease of the party of the first part, and shall be made a preferred claim against his said estate, and shall be paid out of the proceeds of his estate next to the funeral expenses, and is hereby made a lien upon said estate until paid. In witness whereof the said parties have hereunto set their hands and seals the day and year first above written. Burtis S. Taylor. [Seal.] Armenia Jeane Pardee. [Seal.]" On final hearing, the court decreed that this agreement was free from fraud or undue influence, so far as shown by the evidence, except in so far as fraud or undue influence may be inferred from the fact that the said contract did not make a fair and reasonable provision for his wife upon his death, taking into account the circumstances of the parties and the condition of the estate of the said husband, but the same was inadequate, inequitable, and unreasonable, and not such a contract as a court of equity will hold to be an equitable bar for the widow's dower, but the same does not bar her dower and homestead. The decree further appointed commissioners to assign dower, directing them to assign dower to complainant in all the lands whereof Burtis S. Taylor died seised, giving her, without prejudice to the homestead rights of the minor child of the said Burtis S. Taylor, the homestead or dwelling house, if she so desired. The commissioners assigned dower, and reported their action to the court, which report was approved by the court. Damages were thereafter assessed to complainant for the detention of her dower amounting to $880.20. The defendants bring the case to this court by appeal.

McCulloch & McCulloch, for appellants. W. T. Whiting and L. D. Puterbaugh, for appellee.

SCHOLFIELD, J. (after stating the facts). Excluding, as we must, on the objection of appellants, the testimony given by appellee upon the hearing, there is no evidence in the record of the circumstances attending the making of

this agreement. No one witnessed its execution, and no one was informed that such an instrument had been executed until long after its execution. Some expressions of Taylor and admissions of complainant that such an instrument had been executed are proved; but Taylor's expressions were as to the effect of the instrument, making no explanation of the circumstances attending upon its execution; and the admissions of complainant are accompanied by the explanation that if she had known, at the time the instrument was executed, what she knew at the time of making the admission, she would not have signed it. The parties were married four days after the date of this agreement,—October 22, 1883,—and Taylor died on the 30th of June, 1889. At the time of Taylor's death, he was seised of real estate estimated to be of the value of $28,000, of most of which he was seised at the time the agreement was executed. His personal estate, at the time of his death, was estimated to be of the value of $13,000. How much of this he owned at the time the agreement was executed does not appear. The parties were cousins. Both had been previously married; he twice, and she once. She had one daughter, then married, and living apart from her. He had three sons and three daughters, two or three of whom were minors, but not of a very tender age. The complainant was born and raised in the city of New York, and resided there until she came to Peoria county, shortly previous to her marriage. She had no property, either real or personal, and maintained herself by dressmaking. Taylor had been a resident of Peoria county for many years, but we think there is competent evidence in the record clearly proving that at the time this agreement was executed he knew that complainant had no property. There is not a particle of evidence in the record tending to show that it was anticipated by the parties, when this agreement was executed, that the complainant would, or could in any understood way, acquire a separate property subsequent to her marriage. In view of these facts that must be taken into consideration in connection with the making of the agreement, the agreement is one-sided, and unfair to the complainant. It is a virtual relinquishment on her part of dower in his real estate, and of her claim for a personal allowance in his personal property, and of what she would take in his personal estate under the statute of descents, for $2,000, to be paid to her within two years after his decease. Having no separate property, and the acquisition of none in contemplation, the surrender of his rights as to such property is meaningless. Nor do we agree with counsel that the provision that children to be born of the contemplated marriage shall inherit equally with his other children amounts to a contract in behalf of such children. The language is: "Should any children be born of said marriage, and survive the party of the first part, said issue shall inherit all the estate of the party of the first part equally with any issue the party of the first part may have from former marriage or marriages, the same as if no contract existed between the parents," plainly intending not to restrict the power of disposition by sale or devise, but to leave the inheritance of his property, as respects his children by her, unaffected by the agreement; and so they were as well off without as with this stipulation. The sum to be paid is not above one half, if, indeed, it is that, of what complainant would have received as widow from the personal estate alone in the absence of any agreement; and it is to be received at a date no earlier than she would have received it in the absence of an agreement. It is unnecessary to say that complainant is not competent to enter into such an agreement. It may be conceded that she had the legal capacity to make such a contract, and that marriage was a sufficient consideration to support it; but, in the absence of clear and satisfactory proof, it is not to be presumed that she would, with full knowledge of all the circumstances, have entered into such a contract. Parties to an antenuptial contract occupy a confidential relation towards each other. Kline's Estate, 64 Pa. St. 124; Pierce v. Pierce, 71 N. Y. 154; Rockafellow v. Newcomb, 57 Ill. 186. While they may lawfully contract with each other where there is full knowledge of all that materially affects the contract, yet, where the provision secured for the intended wife is disproportionate to the means of the intended husband, it raises the presumption of designed concealment, and throws the burden upon those claiming in his right to prove that there was full knowledge on her part of all that materially affected the contract. Cases cited supra; Bierer's Appeal, 92 Pa. St. 267; Tierman v. Binns, Id. 248; Spurlock v. Brown (Tenn. Sup.) 18 S. W. 868 (not yet officially reported). The burden here was, therefore, upon appellants to prove by satisfactory evidence that appellee had knowledge of the character and extent of her intended husband's property, and of the provisions and effect of this instrument, or, at all events, that the circumstances were such that she reasonably ought to have had such knowledge at the time this instrument was executed. In our opinion, they failed to make such proof. It is further contended that there is error in the decree in awarding the homestead to complainant as part of her dower, without recognizing the existing rights of William G. Taylor therein. In our opinion, this is a misapprehension of the effect of the decree. It expressly directs that the commissioners shall give her, "without prejudice to the homestead rights of the minor child of the said Burtis S. Taylor," who is William G. Taylor, "the homestead or dwelling house of her husband," etc. The clause directing her to be let into possession is subordinate to this. She is to be let into possession of the premises "so assigned to her as dower;" that is, in those where William G. Taylor, the minor, has a homestead right, without prejudice to that right, as well as absolutely unto those where there are no conflicting rights. The decree is affirmed.

CRAIG, J., dissents.

TAFT v. TAFT et al. (two cases).

(40 N. E. 860, 163 Mass. 467.)

Supreme Judicial Court of Massachusetts. Worcester. May 22, 1895.

Case reserved from supreme judicial court, Worcester county; Lathrop, Judge.

Actions by Emeline N. Taft against Luke Herbert Taft and others, and by Luke Herbert Taft and others, executors, against Emeline N. Taft. The first of these cases was a writ of entry to recover one undivided sixth of a tract of land by virtue of an antenuptial agreement entered into between the plaintiff Emeline N. Taft, and her husband, Moses Taft, under which the plaintiff agreed to accept as her dower interest in the estate of her husband only one-sixth of his real estate. The second suit was a bill in equity for instructions under the will to settle the rights of the plaintiff in the first suit under the will as it related to the contract. Emeline N. Taft claimed both under the antenuptial agreement and under the will. Case reserved.

Hopkins & Bacon, for Emeline Taft. Hosea N. Knowlton, for residuary legatees.

ALLEN, J. The principal question presented by these cases is whether the provisions in the testator's will in favor of his wife were intended to be a substitute for her rights under the antenuptial agreement, so that by accepting the provisions of the will she is precluded from claiming also under the agreement. By the antenuptial agreement, which was dated December 12, 1857, she was to continue to have and to hold all of her own estate, real and personal, after the marriage, and also such other estate as she might subsequently acquire in her own right; and, in case he should survive her, all of the above was to descend to her child or children. In case she should survive him, she was to be endowed in one-half part only of his real estate; that is, her dower was to be one-sixth part only instead of one-third part of his real estate; and she was to receive one-sixth part only instead of one-third part as her distributive share in his personal estate. She was also to release her rights of dower and homestead in case he should wish to convey real estate during coverture; and, in case his heirs or other persons interested in his real estate after his death should wish to do so, she was to release her rights of dower and homestead on receiving a just equivalent therefor. This antenuptial agreement was not to apply to any house in which they might live at the time of his decease. There is nothing to show what amount of property she owned then or at any time thereafter. He died April 2, 1893. His property had largely increased during their life as husband and wife, and after his death it was appraised as follows: Personal property, $309,250; homestead, $9,000; other real estate, $6,800; being in all, $325,050. His debts were from $3,000 to $5,000. The residuary legatees contend that she has no such present interest in the real estate, other than the homestead, as to enable her to maintain a real action, because the contract does not amount to a jointure. The contract, however, does not purport to bar her right of dower wholly, but cuts it down one-half. She surrendered one-half her right of dower in all real estate he might die seised of, except the homestead. The agreement does not create an estate in her. The law creates the estate, which, by the agreement she gave up to the extent of one-half. They further contend that under the agreement she takes no interest in the personal estate, because the words used are that she shall receive one-sixth part only, instead of one-third part, as her "distributive share" of his personal estate; that the words "distributive share," in their legal meaning, relate only to an intestate estate, or to an estate made intestate as to a widow by her waiving the will; that this is not an intestate estate in either sense, and therefore that the contract gives her no right to any portion of his personal estate. Such we understand to be the contention in behalf of the residuary legatees. But this is too strict and technical a construction of the words used. The meaning is that she shall receive one-sixth part of his personal estate. In view of the contract, then, taken by itself alone, she would now be entitled to dower in the homestead, to a life interest in one-sixth part of the rest of his real estate, and to one-sixth part of his personal estate. Her share of the personal estate would amount to $51,541.67. If there were no antenuptial agreement, and no will, she, by law, would be entitled to dower in all of the real estate, and to one-third part of the personal estate, which one-third would amount to $103,083.33. Mr. Taft's will is dated February 23, 1886. The value of his property at that date is not given. The will makes no mention of the antenuptial agreement, but gives to "my beloved wife" the use of the homestead for life; the furniture, etc., of the value of $1,000; the sum of $5,000; and an annuity of $1,200 during her life. To raise this annuity would require the holding of $30,000, reckoning the income at 4 per cent., which counsel on both sides assume to be a reasonable rate. It is apparent that, if the provisions for her in the will are held to supersede the antenuptial agreement, she will get materially less than by the agreement, estimating the property at its appraised value after the testator's death. There is no intimation in the will that its provisions were intended to supersede the agreement. He could not cut down her rights under the agreement without her consent. We find nothing in the circumstances to show an intention of asking her consent to any reduction or change of her rights under the agreement. It seems probable, rather, that with the increase of his property he wished to do more for her comfort and enjoyment during life. To this end he gave her outright $5,000 in money, and furniture of the value of $1,000; the use for life of the homestead, instead of her dower therein;

and what practically amounts to the income of $30,000 during her life. His own descendants will ultimately get the whole of this property, except the $5,000 in money and the furniture; and even with the addition of these provisions in her favor to her rights under the agreement she will get less from his estate than she would have got if there had been no agreement and no will. The result is that she has the right to take what is given to her by her husband's will in addition to what she is entitled to receive under the antenuptial agreement. She is entitled to judgment in the real action, and in the petition of the executors instructions will be given in accordance with this opinion. Ordered accordingly.

THOMPSON et al. v. TUCKER-OSBORN.

(69 N. W. 730.)

Supreme Court of Michigan. Jan. 5, 1897.

Appeal from circuit court, Lenawee county, in chancery; Victor H. Lane, Judge.

Bill by Gamaliel I. Thompson, executor of the estate of John M. Osborn, deceased, and others, against Sarah A. Tucker-Osborn, for specific performance of an antenuptial contract between defendant and deceased. From a decree dismissing the bill, complainants appeal. Reversed.

Fellows & Chandler and Watts, Bean & Smith, for appellants. F. A. Lyon and L. R. Pierson, for appellee.

LONG, C. J. On October 3, 1891, John M. Osborn married the defendant. Mr. Osborn was at this time upwards of the age of 70 years. He had been married twice before; had retired from the banking business some years before; was suffering from a lingering disease. He had, some time before this, submitted to an operation, by which a part of one of his feet had been removed. It was well known by his friends and those associated with him that it was a disease which must prove fatal in the near future, and was known as "senile gangrene." The defendant had been in Mr. Osborn's employ as a servant woman and housekeeper for something like six years before the marriage. She had never been married, and, prior to the time she commenced working for Mr. Osborn, had supported herself by going out to service. On the 16th day of September, before the marriage, Mr. Osborn, evidently in contemplation of the marriage, drew in duplicate an antenuptial contract, as follows: "This antenuptial contract or agreement, made this 16th day of September, A. D. 1891, between John M. Osborn, party of the first part, and Sarah A. Tucker, party of the second part, both of the township of Pittsford, county of Hillsdale, and state of Michigan, witnesseth: That the party of the first part, for the reason of a marriage to be consummated between and by the first and second parties hereinbefore named, does hereby agree and promise that said second party shall be supported from the estate of which I may die possessed for the term of her natural life, said support to be by providing a home and such an amount monthly or quarterly or yearly as may be necessary to enable her to live in comfort, and equal to such as she has heretofore enjoyed, and, in case of sickness, such added amount as may be necessary for care, medical attendance, and other necessary expenditures. The party of the second part, in consideration of the above-named provisions for support, hereby accepts the same as marriage settlement, and hereby waives all rights in a will now made by first party, and all rights of dower of real estate, and all rights in the personal estate of which said first party may die possessed. It is hereby further agreed between said parties that the delivery of this contract, duly signed, shall be a bar from any claim from either party as to services, money, or support, or any other claim whatever existing at the time this contract shall be executed. It is further agreed that funeral expenses and rights of burial are considered as an inherent part of this contract. It is further agreed that this contract holds good only so long as second party shall remain the widow of said first party. The above contract is in duplicate, one retained by each party. In witness of the above, the parties thereto hereby subscribe their names and affix their seals, this 13th day of September, A. D. 1891. John M. Osborn. [L. S.] Sarah A. Tucker. [L. S.] Witnesses: S. Van Etta. H. S. Van Etta." On the 30th day of September, three days before the marriage, this contract was signed in duplicate by the parties, in the presence of two witnesses. One of these contracts was placed in an envelope marked "John M. Osborn, Personal Matter," in Mr. Osborn's handwriting. The other was placed in an envelope marked "Sarah A. Tucker." Both envelopes were sealed, and placed in an envelope which was marked "John M. Osborn's Will," and were left in a trunk with Mr. Thompson, who was formerly partner of Mr. Osborn, at Mr. Thompson's bank. Before Mr. Osborn's death, he executed a will, clause 2 of which, it is claimed, was made for the purpose of carrying out the terms and provisions of said antenuptial contract, and is as follows: "Second. I give, devise, and bequeath to my good wife, Sarah A. Osborn, the occupancy, use, income, and profits of all the residue of my said homestead farm which is left after deducting such thereof as I have given and devised to my nephew, said Gamaliel O. Baker, in the first clause of this, my will, for and during the term of her natural life, with the right to have, during her occupancy thereof, her necessary firewood from that part of my homestead farm devised in the first clause of this, my will, to Gamaliel O. Baker, as an estate for life, but not to commit any waste thereof. Also, I give, devise, and bequeath to my said wife, Sarah A. Osborn, to be hers absolutely, all my household goods and my mare, named Nelly, and my sorrel colored horse, named Dan, and my two phaetons, and the two single harnesses, blanket, and whip used with them; also the jack used to oil the phaeton with. Also, I place in trust in the hands of my executor the sum of five thousand dollars, to be used according to the good judgment and discretion of my executor, so much thereof as may from time to time be necessary, in with my other devises and bequests to her, for her comfortable support in health and sickness during her natural lifetime, and for her funeral expenses; but, if my said wife shall again marry, then from and after the date of her marriage said support, and also her rights of occupancy, use, and enjoyment of the land and premises hereinbefore devised to her, shall cease and be ended, and the same shall then revert; and it is my intention and my will that the provisions that I have made for

my said wife in this, my last will and testament, shall be received and accepted by her in full satisfaction and bar of dower in all my real estate." Mr. Osborn died on the 9th day of December, 1893, and his will was admitted in regular form to probate. Previous to the making of this antenuptial contract, and on October 22, 1889, Mr. Osborn gave the defendant a paper which, together with the indorsement thereon, is as follows: "$500. One year from date, for value received, I promise to pay Sarah A. Tucker five hundred dollars, the same to be paid to the above only, not transferable by assignment or descent of property. John M. Osborn. Hudson, Mich., October 22nd, 1889." Indorsed thereon: "I hereby extend the within note on the terms as stated therein, payable at any time, at the option of J. M. Osborn or by his estate when settled. [Signed] Sarah A. Tucker." The indorsement was made before the antenuptial contract, and before the marriage.

These are the facts as claimed by complainants, and as found by the court to be true upon the hearing of said cause in open court. After the probate of the will and the appointment of commissioners on said estate, the defendant, repudiating the contract, and denying the validity thereof, and refusing to accept the provisions made for her in said will, presented said note to the commissioners, as a claim against the estate of the deceased, and had the same allowed, from which allowance John M. Baker, one of the complainants, appealed to the circuit court for the county of Hillsdale, where said appeal is still pending. Defendant also brought suit in the circuit court for the county of Hillsdale, in ejectment, to recover what she claimed to be her dower estate in the land owned by the deceased in Hillsdale county, and also brought suit in the circuit court for the county of Lenawee, in ejectment, to recover what she claimed to be her dower estate in the land owned by the deceased in that county at the time of his death. The executor named in said will and the other complainants (legatees named in said will) filed this bill, asking for a specific performance of said antenuptial contract, and to restrain the defendant from further prosecuting her claim before the commissioners and the ejectment suits. The testimony was taken in open court, and on March 14, 1896, the court entered a decree dismissing the bill, but finding the following facts: "First. That John M. Osborn died at the time alleged in said bill of complaint, the owner of the real estate described and set forth in said bill of complaint. Second. That on the 30th day of September, 1891, the said John M. Osborn and said Sarah A. Tucker (now Sarah A. Tucker-Osborn, the defendant in this suit) made and executed and delivered the antenuptial contract set forth and described in said bill of complaint. Third. That said antenuptial contract was made by the said parties with a full understanding of its objects, effects, and purposes. Fourth. That the said Sarah A. Tucker was then possessed of such information by which she knew the extent and value of the property of said John M. Osborn. Fifth. That the said John M. Osborn and said Sarah A. Tucker afterwards intermarried. Sixth. That the said John M. Osborn, in his lifetime, made and executed the will set forth and described in said bill of complaint. Seventh. That the provisions therein named for the said Sarah A. Tucker-Osborn were made by the said John M. Osborn for the purpose of carrying out said antenuptial contract. Eighth. That said provisions in said will do not fully carry out the terms of said antenuptial contract. Ninth. That said antenuptial contract is not sufficiently specific in its terms for this court to decree a specific performance thereof. Tenth. That said antenuptial contract cannot operate to bar dower." From this decree, complainants appeal.

1. Defendant contends that the court was in error in the findings of fact, and that, in any event, the bill was properly dismissed. We cannot agree with this contention. We are satisfied from the evidence that the antenuptial contract was made between the parties, and delivered, as claimed by the complainants, and that it was made with a full understanding between them of its object and purposes, and that the defendant well knew the extent and value of the property of John M. Osborn; neither have we any doubt but that John M. Osborn intended to fully carry out the provisions of the contract by clause 2 of his will above set out. It would be of no interest to the parties or the profession to set out the testimony in full upon which we reach these conclusions. They are the conclusions of the court below, who heard the testimony, and we cannot well see how any other result could be reached, under the evidence in the case.

2. It is further contended that in any event the court was correct in finding that the antenuptial contract could not be enforced, for the reasons (a) that the court had no jurisdiction; (b) that the contract is void on its face; (c) that it could not bar dower; (d) that it is not sufficiently specific to be enforced; (e) that the will does not carry out the terms of the contract. A marriage between parties who have previously made a contract with each other, to be performed presently or during the marriage, releases or extinguishes such contract. Such contracts, however, when made in contemplation of marriage, and respecting the property of each of the parties, though released or extinguished at law, are held good in equity, and will be enforced by a court of chancery against the heirs of the party in default. Miller v. Goodwin, 8 Gray, 542. As stated by Mr. Schouler in his work on Domestic Relations (section 173): "In this country the validity of marriage settlements is generally recognized; and it is well understood that

almost any bona fide and reasonable agreement made before marriage, securing the wife either in the enjoyment of her own personal property, or a portion of that of her husband, either in coverture or after death, will be enforced in a court of chancery." In Stilley v. Folger, 14 Ohio, 610, the court said: "All supposed actual fraud may be laid out of view. Why should not this agreement be enforced? Antenuptial contracts have long been regarded as within the policy of the law, both in Westminster and the United States. They are in favor of marriage, and tend to promote domestic happiness, by removing one of the frequent causes of family dispute,—contention about property, and especially allowances to the wife. Indeed, we think it may be considered as well settled at this day that almost any bona fide and reasonable agreement made before marriage to secure the wife the enjoyment either of her own separate property or a portion of that of her husband, whether during the coverture or after death, will be carried into execution in a court of chancery." In Paine v. Hollister, 139 Mass. 144, 29 N. E. 541, a bill was filed by the executor to enjoin the widow prosecuting a petition in the probate court for an allowance out of the husband's estate, setting up the fact that the defendant had entered into an antenuptial contract whereby she had agreed to accept a certain provision in lieu of dower, or any allowance or distributive share in the estate of her husband. There the court said: "There is no doubt that the contract is lawful in its general features; that it was not extinguished by the marriage of the parties; and that a resort to equity is proper to enforce it." The same principle is recognized in equity in Tarbell v. Tarbell, 10 Allen, 278; Jenkins v. Holt, 109 Mass. 261; Blackinton v. Blackinton, 110 Mass. 461; Sullings v. Richmond, 5 Allen, 187; Collins v. Collins (Iowa) 33 N. W. 442; McNutt v. McNutt (Ind. Sup.) 19 N. E. 115. In a note to the last case cited, it is said: "Executory agreements made between a man and woman, who afterwards marry, and which then becomes void at the common law, in the application of the conscientious principles of equity, will be specifically enforced against either husband or wife at the suit of the other." This doctrine has been fully recognized in this court in Phillips v. Phillips, 83 Mich. 259, 47 N. W. 110.

It is therefore well settled that a court of chancery has jurisdiction to determine the questions here presented, and that the parties are in the proper forum. But it is claimed that such a contract would not bar dower in the lands of the husband. It is contended that the contract ipso facto operated as a bar to her dower, like a jointure or pecuniary provision settled upon her in accordance with the terms of sections 5746–5749, 2 How. Ann. St.; but that it was an executory agreement between the parties, and, when performed by Mr. Osborn or those representing him, the court will compel the defendant to specifically perform her part of the contract, and release her dower right; and that the making of the will was performance on the part of Mr. Osborn. If the contract is so specific that its performance may be decreed, and the will operates to carry out the agreement on the part of Mr. Osborn, we have no doubt of the correctness of this contention. Dakin v. Dakin, 97 Mich. 284, 56 N. W. 562. That the defendant entered into the contract we have no doubt, fully understanding its terms and the financial condition of Mr. Osborn. She had been an inmate of his house for several years. There seems to have been made ample provision for her support and maintenance by the contract, and such as was satisfactory to her. But it is said that it is not sufficiently specific, and for that reason it cannot be enforced. The contract provides for her support from the estate by providing a home and such amount monthly or quarter-yearly as may enable her to live in comfort, and equal to such as she had heretofore enjoyed, and, in case of sickness, such added amount as may be necessary for care, medical attendance, and other necessary expenditures, and at her death funeral expenses and rites of burial. These amounts are easily ascertainable. Her former mode of life was to be taken into consideration in fixing what the home should be, as well as the allowance to be made. She was a woman without means at the time this contract was made, and in the employ of the deceased as housekeeper. Before that time she was there in the capacity of a house servant. In Collins v. Collins (Iowa) 33 N. W. 442, the contract provided that "E. A. Collins [the husband] does by these presents agree to, and does hereby, settle upon Maria, out of his estate, a sufficient amount to keep and maintain her during her life, or as long as she remains his widow; that such amount so to be furnished shall be sufficient to maintain Maria in such circumstances and in such manner as the estate of said Collins, Sr., will justify, and as would be reasonable to be furnished by a party or an estate in like financial circumstances." The court decreed specific performance, and fixed the amount that would be reasonable under all the circumstances. In Jacobus' Ex'r v. Jacobus, 20 N. J. Eq. 49, it was held that it was within the power of a court of equity to determine what a good and sufficient support was, and to direct its payment. In Preston Nat. Bank of Detroit v. George T. Smith Middlings Purifier Co., 84 Mich. 384, 47 N. W. 502, a contract less specific than the present one was enforced by this court.

Did the will fully carry out the terms of the contract? By the will, the defendant was given what was left of the home farm, after taking off the part left by the will to a nephew, with the right to firewood from the part devised to the nephew. She was also given absolutely the household furniture, two horses, two phaetons, etc. He then placed the sum of $5,000 in trust in the hands of his

executor for her use, and to be paid from time to time, as her necessities demanded. It is true that the payments, by the terms of the will, were not in exact accord with the terms specified in the contract,—that is, monthly or quarterly,—but from time to time; and there is nothing in the case showing that it will not be paid in accordance with the contract. It cannot be said that the will does not carry out the terms of the contract, and meet the requirements of it. The court below was in error in holding that the contract was not specific enough to be enforced, and that the will did not carry out its terms. The decree below must be reversed, and a decree entered here, granting the prayer of the bill. No costs of this court will be allowed to either party. The other justices concurred.

KEELER v. EASTMAN.

(11 Vt. 293.)

Supreme Court of Vermont. Rutland. Jan., 1839.

The orator's bill stated, in substance, that Seba Eastman, in October, 1828, executed a lease of a certain farm, described in the bill, to the defendant and his wife, during their natural lives, and afterwards, in February, 1832, conveyed his reversionary interest in the farm to the orator. The bill then alleged that the defendant had committed waste on the premises, and especially upon a sugar orchard, by cutting down and carrying away and selling the wood and timber growing thereon, and concluded with a prayer for an injunction to stay further waste, and that the defendant might be decreed to account to the orator for such as had been committed. The substance and amount of the testimony will appear from the opinion of the court, delivered by

BENNETT, Chancellor. The great subject of complaint seems to be the destruction of the sugar orchard, which it is alleged has been cut down and destroyed since the orator became possessed of the reversionary interest, in February, 1832. It is unnecessary to go into the particulars of the evidence, which is quite voluminous, and is evidently somewhat contradictory; but suffice it to say that it seems to be pretty well established from the current of the testimony, that the principal part of the chopping in the sugar orchard was prior to the winter of 1832, and this too by Seba Eastman and Charles Eastman, while Seba had the reversionary interest. The whole evidence taken together satisfies the court that the farm, on the whole, has been managed by the tenant for life, in a prudent and husbandlike manner; and that there have been no acts of wantonness on the part of the defendant, or disregard to the ultimate value of the reversionary interest. Indeed, the value of the property seems to *have been enhanced by the betterments and good husbandry of the defendant. *294 We are not aware of any decisions in the courts of this state, laying down any precise rules establishing what acts shall constitute waste; and, indeed, it is difficult there should be any. The general principle is that the law considers every thing to be waste which does a permanent injury to the inheritance. Coke Litt. 53, 54. Jacob's Law Dic. 6 Vol. 393, Tit. Waste. 7 Com. Dig. Tit. Waste.

By the principles of the ancient common law, many acts were held to constitute waste—such as the conversion of wood, meadow or pasture, into arable land, and of woodland into meadow or pasture land—to which we might not, at the present day, be disposed to give that effect. These principles must have been introduced when agriculture was little understood, and they are not founded in reason, and many of them are inconsistent with the most important improvements in the cultivation of the soil. In England that species of wood, which is designated as timber, shall not be cut, because the destruction of it is considered an injury done to the inheritance; and, therefore, waste. From the different state of many parts of our country a different rule should obtain in our courts; and timber may and must, in some cases, to a certain extent, be cut down, but not so as to cause damage to the inheritance. To what extent a tenant for life can be justified in cutting wood, before he shall be guilty of waste, must depend upon a sound discretion applied to the particular case. It is not in this state waste, to cut down wood or timber, so as to fit the land for cultivation, provided this would not damage the inheritance, and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm. So, to remove the dead and decaying trees, whether for the purpose of clearing the land, or giving the green timber a better opportunity to come to maturity, is not waste. We are satisfied that, when the wood or timber is cut with this intent, and is according to a judicious course of husbandry, the tenant is not guilty of waste, though the wood or timber so cut may have been sold, or consumed off of the farm. This farm, it is to be remembered, is comparatively in a state of nature, and the town in which it is situated comparatively *new; and what might constitute waste, as applied to one farm in one *295 place, might not, when applied to another, in a different place.

Though the evidence is somewhat contradictory, we are not satisfied that the defendant has gone beyond his rights. The orator's bill is therefore dismissed. But inasmuch as the defendant has made declarations claiming the right to cut off all the wood and timber from the farm if he chose to do it, and threatened the doing of it, the bill was not brought without some apparent cause, and the defendant in this particular is not without fault; it is therefore, dismissed without costs.

R. R. Thrall and E. N. Briggs, for orator
E. L. Ormsbee, for defendant.

LOOMIS v. WILBUR.

(Fed. Cas. No. 8,498, 5 Mason, 13.)

Circuit Court, D. Rhode Island. Nov. Term, 1827.

This was an action of waste under the statute of Rhode Island (see Dig. 1822, p. 199), for the recovery of the freehold wasted. Plea, the general issue. Daniel Wilbur, deceased, by his will, made on the 20th December, 1802, and proved on 1st of June, 1807, devised all his lands undisposed of, including the premises, to his son Daniel Wilbur, the defendant, for his life, remainder to his wife for her life, if she survived him, remainder to Daniel Wilbur, his grandson, and son of his son Daniel, in fee; but if his said grandson died before 21 years of age, &c. then to his son Daniel in fee. The grandson attained the age of 21 years and is still living. The grandson sold his interest in the estate to one James Aldrich, through whom, and by intermediate conveyances, and a levy on execution, the premises came to the plaintiff [Luther Loomis] on the 23d of December, 1825. The only waste proved was, the cutting of a few timber trees sparsely on the land, not exceeding ten or fifteen in number. It was proved, that the defendant was very poor and unable to repair the fences and buildings from other means; that the principal part of the trees were cut down for repairs of the buildings. They were sold by an agent, and boards, already sawed, &c. were purchased with the proceeds and applied to the repairs. This was the most economical way of attaining the object, and most for the benefit of the estate, and was done on consultation with the agent, before the trees were cut down. It was also proved, that a timber tree or two were cut down and sold; but whether the proceeds were applied to repairs did not appear. But it did appear, that the defendant owned a contiguous wood lot, and sometimes used the timber from that lot for fire bote and house bote.

The plaintiff contended, that the case of waste was clearly made out, and that the sale of the timber was waste, by the authorities; that the tenant might have cut down trees for the necessary repairs and fire bote, but had no right to sell them; and he cited Bac. Abr. "Waste," F. The defendant contended, that there was no waste; that no injury was done to the estate; that repairs were necessary; and there was no difference between applying the proceeds of the sale and the identical timber.

Mr. Richmond, for plaintiff.

Mr. Tillinghast, for defendant.

STORY, Circuit Justice (charging jury). The supposed waste in this case is so very small in point of value, that if a forfeiture is incurred, it must operate with peculiar severity. The jury therefore ought clearly to see, that the plaintiff makes out his case upon reasonable evidence. The question in cases of this nature is, whether the tenant has done any injury to the inheritance; for the averment in the declaration is, that the timber has been cut down to his disherison. If, under all the circumstances, what has been done, has been for the benefit of the estate, for necessary repairs, and for the interest of the remainder-man, then there has been no waste. Now it is admitted, that the tenant is very poor and had no other means to repair; and that the repairs were indispensable, and any longer omission would have been very injurious to the estate. The quantity of timber applied to the repairs is not pretended to be extravagant or unnecessary. But it is said, that the same timber, which was cut down, ought to have been applied, and not sold, and that the sale was per se waste. For this position reliance is placed on a citation from Bac. Abr. "Waste," F, where it is said, that if a lessee cuts trees and sells them for money, though with the money he repairs the house, it is waste. The authority relied on in Bac. Abr. is 1 Co. Litt. 53b. The doctrine there stated may be good law, if it be properly understood and limited. If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and if so, it would not be purged or its character changed, by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were bonâ fide applied for that purpose, in pursuance of the original intention, it does not appear to me to be possible, that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense, that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate.

As to the other part of the case, the sale of one or two trees, the application of which to repairs is not established, it is, if at all, waste in its most minute form. But the jury will judge of the facts, and consider in the first place, whether the proceeds might not have been applied to the repairs. In the next place, if they were not, but if an equal quantity of timber from the other woodlot of the defendant was so applied, and these trees were only taken by way of compensation and remuneration therefor, then there was no waste. It has been said, that the terms of the will make the tenant for life dispunishable of waste, and that the intention was to give him a full and entire control of the inheritance during his life. The words are certainly very broad and comprehensive, giving ample powers to a tenant for life for general purposes; but my opinion is, that they do not authorize any act to be done, which injures the inheritance, much less do they authorize positive waste.

Verdict for the tenant.

WEBSTER et al. v. PEET et al.

(56 N. W. 558, 97 Mich. 326.)

Supreme Court of Michigan. Oct. 27, 1893.

Appeal from circuit court, Gratiot county, in chancery; Sherman B. Daboll, Judge.

Bill by Charles E. Webster and Nathan Church, for themselves and as trustees for Church, Bills & Co., First National Bank of Ithaca, Mich., the Nelson Barber Company, Parish & Scott, George P. Stone, Wolf Netzorg, William Pullen, O. H. Heath & Sons, Ithaca Milling Company, and Robert Smith, against Nelson G. Peet and Ann L. Peet, to quiet title and restrain waste. Decree for complainants. Defendants appeal. Affirmed.

J. H. Winton and Mitchel & Hawley, for appellants. Stone & Salter and John M. Everden, for appellees.

MONTGOMERY, J. One Kosciusko P. Peet was indebted to various persons and firms to an amount aggregating $3,150.41. He was the owner of a farm of 320 acres, 100 of which was cleared, and the balance woodland, the farm being subject at the time to two mortgages, amounting to about $3,700. To secure the creditors first mentioned, he gave to complainants, as trustees for the creditors, a deed of the lands above referred to, subject to the mortgages then upon the land. The deed was in the usual form, with a recitation added that the conveyance was for the benefit of the creditors named, and with the following further clause: "This conveyance is made to said trustees, with full power granted to them to sell, convey, mortgage, or otherwise assign or transfer the same for the purpose of paying and satisfying the aforesaid claims and the necessary expenses, the residue or remainder, if any, after the satisfaction of said above-described claims, to belong to, and to be returned to, the said parties of the first part." The deed was acknowledged June 13, 1891, and duly recorded. On the 9th of February, 1892, the defendant Ann L. Peet took a conveyance from Kosciusko P. Peet, which conveyance contained an attempted revocation of the power of attorney in the deed of June 13, 1891. The defendants, who had been in possession under Kosciusko P. Peet, remained in possession after the conveyance to complainants, and, upon the conveyance being made to Ann L. Peet, she claimed title, and the right to cut and remove timber. The bill in this case was filed with the double purpose of setting aside the conveyance to Ann L. Peet as a cloud upon complainants' title, and to restrain defendants from committing waste. The latter was the only relief granted below. Defendants appeal. Complainants do not appeal.

1. It is claimed that the conveyance to complainants amounted to no more than a mortgage, and that, as the bill is predicated upon the claim that complainants are the actual owners of the land, the relief was improperly granted. We think the contention cannot be allowed. The deed itself is set out in full in the bill of complainants, and, if the facts are sufficient to justify the relief granted, it is immaterial that the complainants, in their bill, assert a broader claim than the facts which they also disclose in their bill justify.

2. It is claimed as a matter of fact for the defense that either after the deed was made, or after instructions given to the scrivener for its preparation, additional claims were inserted, not agreed upon between the parties, and that this in either case constitutes the deed a forgery. A careful examination of the testimony upon this point convinces us that this defense is not made out. It would not be profitable to quote the testimony at length, but it is sufficient to say that we are satisfied that the conclusion of the circuit judge, who saw the witnesses, upon this point, is not only well supported by the testimony, but that, upon the record as made in this court, we think no other conclusion can be reached without doing violence to the natural inferences and probabilities which surround the case.

3. It is claimed that no waste was being committed. The bill avers that the defendants, without permission or authority from complainants, were at the time of filing the bill engaged in cutting down and drawing away the trees and timber, and threatening and preparing and intending to continue in cutting and carrying away the timber and trees growing, standing, lying, and being on said premises. The answer set out that the deed under which complainants claimed was a forgery. The answer does not deny the intention to continue cutting timber, but states that "the timber taken off said land by these defendants was elm, three thousand feet, all down timber, cut a year ago last winter; red oak, three thousand seven hundred and thirty-six feet; black ash, five hundred and forty-five feet; white oak, six hundred and seventy feet; basswood, two hundred and forty-four feet; and all of said timber was cut on lands to be cleared, except the white oak, six hundred and seventy feet." It appears, therefore, that there is an admission of the cutting of some timber not for the purpose of husbandry, and which was not done for the purpose of clearing the land. We think this constitutes waste, and particularly where it was done in denial of complainants' rights, and was sufficient in itself, in the absence of denial, to justify the inference that the defendants were liable to continue to commit waste, and authorized the injunction issued in the case. It is to be regretted that the complainants did not put the case in such form as to admit of adjusting the rights of the parties in this proceeding. It is immaterial whether the instrument of conveyance to complainants be treated as an irrevocable power to convey and dispose of the lands for the purpose of satisfying the debts of the creditors named, or

whether, on the other hand, it be treated as a mortgage requiring foreclosure proceedings before a sale. In either event, it is clear that the instrument was intended for the security of the creditors, and the grantor and those claiming under him would have the right to redeem, and to a reconveyance upon payment of the claims. The decree below will stand affirmed, with costs. The other justices concurred.

HORNER v. DEN ex dem. LEEDS.

(25 N. J. Law, 106.)

Supreme Court of New Jersey. June Term, 1855.

Mr. Halsted, for plaintiff in error. Mr. Woodhull, contra.

POTTS, J. This was an action of ejectment, brought to recover possession of a tract of land on Absecum Beach, in the county of Atlantic. The defendant below, John Horner, to maintain his title to six acres of the tract which he claimed, gave in evidence a certain instrument under seal, executed and acknowledged by Jeremiah Leeds, in the words following:

"This indenture, made the first day of April, eighteen hundred and sixteen, between Jeremiah Leeds, of the one part, and John Blake, of the other part, witnesses that the said Jeremiah Leeds doth demise, grant, and to farm let, unto the said John Blake, his executors, administrators and assigns, all that messuage and privilege of erecting a salt works on N. E. end of Absecum Beach, with the privilege of setting a dwelling house thereon; also the privilege of pasture for two cows, with what team the works may want, situate, lying, and being in the township of Eggharbor, in the county of Gloucester, and state of New Jersey, with all and singular the appurtenances thereunto belonging, for any term of years the said John Blake may think proper from the above date, for the consideration of the sum of one hundred dollars, to be laid out by the said Blake or his assigns, in the aforesaid salt works, for the use of the said Jeremiah Leeds, which is to be considered as two shares in said works, that is to say fifty dollars per share, it being part of my plantation whereon I now dwell, will warrant and forever defend, at any term or terms, of years unto the said John Blake, his heirs, executors, administrators, or assigns, or any of them, to have and to hold the said privileges unto said John Blake, his heirs and assigns shall hold and enjoy the said premises; without the lawful let or eviction of him, the said Jeremiah Leeds, his heirs, executors, administrators, or assigns, or any of them, or any person or persons, lawfully claiming by, from, or under them, or any of them, or of the lawful claim of any person or persons, whatsoever, freed and indemnified against all former claims and encumbrances whatsover, made and committed, or to be made, committed, done, or suffered by the said Jeremiah Leeds, his heirs, or any person or persons having or lawfully claim or to claim, by, from, or under him, them, or any of them. In witness whereof the said Jeremiah Leeds has to these presents set his hand and seal, the day and year first above written. Jeremiah Leeds. [L. S.]

"Sealed and delivered in the presence of John Daniel.

her
"Rachel X Steelman."
mark

The plaintiff claimed title through Jeremiah Leeds, and the defendant through Blake; and the principal questions argued by the counsel here were:

(1) Whether this instrument was a lease or a conveyance in fee of the land.

(2) If a lease, when and how it was determinable; and—

(3) Whether it created such a tenure as required a legal notice to quit before ejectment could be maintained.

The court charged the jury that it was a lease; that the term expired when the lessees abandoned the manufacture of salt; and that as such abandonment was their own act, no notice to quit was necessary.

To this instruction of the court the defendant excepted.

The verdict was for the plaintiff below.

The instrument, as will be perceived, is very inartificially drawn, contains a good deal of ambiguous phraseology, and was very well characterized at the circuit as "a badly drawn paper." But still I think its meaning can be ascertained with reasonable certainty.

It is a demise of a messuage on the northeast end of Absecum Beach, for the purpose, I take it, of erecting salt works thereon, to John Blake, his executors, administrators, and assigns; and with the privilege of erecting a dwelling house thereon, and pasturage for two cows and such teams as may be required in carrying on the proposed salt works. The words used are "demise, grant, and to farm let," and these are the usual terms by which a lease is made according to the English precedents (Com. Landl. & Ten.; 6 Law Lib. 34; Woodf. Landl. & Ten. 4); though the word "grant" is not commonly used in our forms of conveyancing when a term of years only is meant to be conveyed. Oliver, in his work on Conveyancing (290), adopts the words "demise, lease, and to farm let"; and in 2 Graydon. Forms Conv. 41, 43, we have both "demise, set, and to farm let," and "demise, lease, and to farm let." It is well settled, however, that the words "give," "grant," "lease," or "set" are equally proper, and have come to be used indiscriminately in instruments of this character.

The time for which the premises are demised is expressed to be "for any term of years the said Blake may think proper from the above date." This is certainly an unusual limitation of a term. Literally taken, it means that the demise is for a term of years only, but that that term is to run during Blake's pleasure—as long as he thinks proper. If, however, we can gather from the whole instrument the intention of the parties, that intention must govern. Now the object had in view by the parties at the time was the erection of salt works, and the carrying on of the business of manufacturing salt on the premises. Except in the use of the technical words demise, grant, and to farm let, there is nothing in the language of the instrument which indicates an intention that the premises should be used for any other purpose than that of erecting, maintaining, and carry-

ing on the work and business of manufacturing salt, and such other uses as were necesssary and incidental to such a business. It is the "privilege" of erecting salt works, the "privilege" of setting a dwelling house on the premises, and the "privilege" of pasturing two cows, with what teams the works may want. The habendum is to have and to hold the said "privileges;" and the instrument gives no description of the premises by metes, bounds, or quantity, though there is a description appended to it by way of note or memorandum. Doubtless the demise is of the land, with the privileges; but we are looking for the general intent of the parties.

Then again, when we look for the consideration of the grant, we find that it is an interest in the salt works. As the instrument expresses it, the demise, "is for the consideration of the sum of $100, to be laid out by the said Blake, or his assigns, in the aforesaid salt works, for the use of the said Jeremiah Leeds, which is to be considered as two shares in said works, that is to say $50 per share." The return for the land, therefore, was in substance the dividends of two shares, a portion of the profits of the contemplated business of manufacturing salt.

Was it the intention, the understanding of the parties, that Blake was to have the land, and refuse to erect the works, or carry on the business of manufacturing salt? or hold it longer than he continued the business out of the profits of which the rent was to come? It is like a lease of a fishery for the annual render of a certain share of the fish caught, or a mine for a share of the ore excavated, or a mill site for a share of the profits of a mill to be erected by the tenant. Could the tenant hold the premises and refuse to fish the fishery, or work the mine, or erect the mill, and carry on the business, even though the lease was for such term as the tenant might think proper? I think not.

But it is insisted that the habendum in this instrument is to Blake and his heirs, and that this must govern the construction, because it is the office of the habendum to determine the quantity of the estate granted. Unfortunately, however, for the argument, it is far from being clear that the habendum is to the heirs. The words are, "to have and to hold the said privileges unto the said John Blake: his heirs and assigns shall hold and enjoy the said premises without the let or eviction of him, the said Jeremiah Leeds," &c. All the words following the name John Blake belong to the covenants rather than to the habendum clause.

The duration of a term, if not definitely expressed in a lease, may be fixed by reference to collateral or extrinsic circumstances. Com. Landl. & Ten.; 6 Law Lib. 50. And it was in evidence in this case that a company was organized for the manufacture of salt on the premises immediately after the date of the instrument in question; and that Blake, for a small consideration, forthwith assigned all his right to the premises to this company for the purpose of a salt works, and for as long as the company might choose, reciting this instrument in his said assignment as a lease from Leeds.

Upon the whole, I am of opinion that this instrument must be taken to be a lease for so long a term as the lessees should use the premises for the purpose of manufacturing salt, and no longer; that such was the intention of the parties, as is fairly deducible from the whole instrument; that it is the only reasonable construction which can be given to it; and that is a construction in accordance with the subsequent conduct of the parties and their successors, &c.

If this is so, the lease was for a term determinable upon the happening of a certain event, to wit, the abandonment of the manufacture of salt by the lessees: and as that abandonment was their own act, they were not entitled to notice to quit. Comyn, 285; 6 Law Lib. 160; Right v. Darby, 1 Term R. 162; Den v. Adams, 12 N. J. Law, 101.

There was, therefore, no error in the charge of the court.

Two other exceptions were taken in the course of the trial. The first was to the admission of certain deeds in evidence, forming part of the plaintiff's chain of title. These deeds are not before the court, nor does the ground of objection to them appear; but inasmuch as the defendant subsequently set up the above mentioned lease from Leeds, he precluded himself from taking advantage of any defect of this sort, for a tenant is not permitted to deny the title of him under whom he claims.

The second exception was to the ruling of the court, refusing to admit evidence, offered by the defendant, of an alleged declaration of the lessor of the plaintiff, that he had sold the premises. It is true that a tenant may show, in an action of ejectment by the landlord, that the landlord's title has expired, or that he has sold his interest in the premises. 2 Greenl. Ev. § 305.

But I am not aware that it has ever been held that this may be shown by merely producing a witness to swear that the lessor of the plaintiff told him he had sold. To let in loose evidence of this description might work serious mischief.

The judgment below should be affirmed.

GREEN, C. J., and OGDEN, J., concurred.

BRANT v. VINCENT.

(59 N. W. 169, 100 Mich. 426.)

Supreme Court of Michigan. May 22, 1894.

Error to circuit court, Berrien county; Thomas O'Hara, Judge.

Summary proceedings by Edward Brant against Alonzo Vincent to recover the possession of demised premises. There was a judgment in defendant's favor, and plaintiff brings error. Affirmed.

George W. Bridgman and M. L. Howell, for appellant. G. M. Valentine and George I. Clapp, for appellee.

GRANT, J. Plaintiff brought summary proceedings under the statute to recover possession of the premises described in the complaint as "that portion of the basement in the Brant block, about 21 feet in width by about 75 feet in length, under what is now the post office in the city of Benton Harbor, being the south 75 feet of the basement room." Plaintiff is the owner of the premises known as the "Hotel Benton Block." July 21, 1890, he executed a lease to the defendant, for five years, of the hotel and portions of the basement, not, however, including the portion here in dispute. Defendant held possession under a parol agreement. What that agreement was is the main fact in dispute. Mr. Brant's version is that it was agreed that defendant might prepare the room for occupancy, and use it until complainant needed it for some other purpose. Defendant's version is that he was to prepare it for occupancy, and have possession during the life of his hotel lease, or until July 10, 1895. The agreement was made about August 1, 1892. Complainant, under the theory that defendant was tenant at will, gave defendant three months' notice to quit, and then instituted this suit. The court instructed the jury that, if they found the agreement as claimed by complainant, he was entitled to recover. If, on the contrary, they found the agreement as claimed by defendant, it was a tenancy from year to year, and his possession was lawful until the end of the second year. Verdict and judgment were for the defendant.

It is conceded that, under the defendant's version, the lease, resting in parol, was void under the statute of frauds. Did it constitute a tenancy from year to year? We think it did. Defendant's testimony tended to show that he immediately performed his part of the agreement, and fitted up the room at an expense of $140. He had been in possession one year, and a greater part of the second, without objection. It is argued, on behalf of the complainant, that there was no annual rent reserved, and therefore, even under the defendant's evidence, the agreement constituted a tenancy at will. It is true that "the reservation of annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year." Jackson v. Bradt, 2 Caines, 169; Rich v. Bolton, 46 Vt. 84. In the latter case many authorities will be found cited. But clearly this rule is not applicable to a parol tenancy for years, void under the statute, where the entire rent has been paid in advance. Under the defendant's evidence he had a lease which, if reduced to writing, would have been valid for five years. H entered into possession of the term. We think there is no well-considered authority holding that he was not a tenant from year to year. The fact that no annual rent is reserved is not conclusive of the character of the tenancy. Where the owner of a farm rented a portion of it by parol for four years, the lessee agreeing to inclose the premises with a fence by way of rent, it was held that a tenancy from year to year was established. People v. Rickert, 8 Cow. 226; Jackson v. Bryan, 1 Johns. 322; Tayl. Landl. & Ten. § 56.

The court, at complainant's request, instructed the jury that defendant could not recover under any agreement made before the written lease, but only upon a verbal one made afterwards. The court, under objection, permitted evidence of conversations between the parties in regard to this room prior to the execution of the written lease, and this is alleged as error, on the ground that all prior negotiations were merged in it. This would be true if defendant relied upon the written lease. But the testimony was competent as bearing upon the subsequent parol agreement. Had the defendant relied upon a previous or contemporary agreement, the evidence would have been incompetent.

The introduction of the written lease, on the part of the defendant, is alleged as error. We do not see how this could have prejudiced the complainant. But, be that as it may, it was competent to introduce it for the purpose of showing the term of the parol lease, which defendant testified was to run to the end of the written lease. We find no error in the record, and the judgment is affirmed. The other justices concurred.

RUSSELL v. FABYAN.

(34 N. H. 218.)

Supreme Judicial Court of New Hampshire. Coos. July Term, 1856.

Mr. Lyford, for plaintiff. H. A. Bellows, for defendants.

BELL, J. Fabyan entered into possession of the premises in question under a written lease, to continue for five years from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseizor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance. 2 Bl. Comm. 150; 4 Kent, Comm. 116; Livingston v. Tanner, 12 Barb. 483. No act of the tenant alone can change this relation; but if the lessor, or owner of the estate, by the acceptance of rent, or by any other act indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease. Conway v. Starkweather, 1 Denio, 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseizor or a tenant at sufferance.

When the demand of possession was made upon Fabyan, upon the 22d of March, 1852, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same ground as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at sufferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseizor, without entry or notice, and may maintain against him any action of tort, as if he had originally entered by wrong. Delaney v. Ga Nun, 12 Barb. 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire, it becomes material to inquire, what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he retains the possession as a wrongdoer, just as a disseizor acquires and retains his possession by wrong. Den v. Adams, 12 N. J. Law, 99; 2 Bl. Comm. 150; 4 Kent, Comm. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner. 10 Vin. Abr. 416, "Estate," D, C, 2.

If no such assent appears, the tenant is entitled to no notice to quit. Jackson v. McLeon, 12 Barb. 483; 12 Johns. 182; 1 Cruise, Dig. tit. 9, § 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action. Livingston v. Tanner, 12 Barb. 483; Den v. Adams, 12 N. J. Law, 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as was held in Preston v. Love, Noy, 120; 10 Vin. Abr. 416.

We have been able to discover but one point of difference between the case of the disseizor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance, until he has entered upon the premises (4 Kent, Comm. 116); a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan, to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right, but by that which governs the case of the disseizor and unqualified wrongdoer.

By statute (6 Anne c. 31, made perpetual 10 Anne, c. 14; 1708, 1712) no action or process whatever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin. Co. Litt. 67, note 377; 3 Bl. Comm. 228, note; 1 Com. Dig. 209. "Action for Negligence," A, 6. It is not necessary to consider whether this statute has been adopted here, though it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseizor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseizor is liable for any damages occasioned by him, whether willful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseizor.

2. Assuming that Fabyan is liable for the loss of these buildings the question arises, whether he is liable in this form of action; and, as we

have remarked, he is not liable in trespass. Chancellor Kent (4 Comm. 116), says: "A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer, or transmit, or which is capable of enlargement by lease, for he stands in no privity to his landlord, nor is he entitled to notice to quit; and, independent of the statute, he is not liable to pay any rent. He holds by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. But before entry he cannot maintain an action of trespass against the tenant by sufferance." 1 Cruise, Dig. tit. 9, c. 2; Rising v. Stanard, 17 Mass. 282; Keay v. Goodwin, 16 Mass. 1, 4; 2 Bl. Comm. 150; Co. Litt. 57b; Livingston v. Tanner, 12 Barb. 483; Trevillian v. Andrew, 5 Mod. 384.

If, then, Fabyan is answerable at all, he must be liable to the action of trespass on the case. There is no evidence of any entry, and the demand of possession, whatever its other effects may be, is not an entry, nor do we find it made equivalent to an entry.

The case of West v. Trende, Cro. Car. 187, Jones, 124, 224, is a decision that case lies in such a case.

"Action upon the case. Whereas he was and yet is possessed of a lease for divers years adtunc et adhuc ventur, of a house, and being so possessed demised it to the defendant for six months, and after the six months expired the defendant being permitted by the plaintiff to occupy the said house for two months longer, he, the defendant, during that time pulled down the windows, &c. Stone moved in arrest of judgment that this action lies not, for it was the plaintiff's folly to permit the defendant to continue in possession, and to be a tenant at sufferance, and not to take course for his security; and if he should have an action, it should be an action of trespass, as Littleton (section 71). If tenant at will hath destroyed the house demised, or shop demised, an action of trespass lies, and not an action upon the case. But all the court conceived that an action of trespass or an action upon the case may well be brought, at the plaintiff's election, and properly in this case it ought to be an action upon the case, to recover as much as he may be damnified, because he is subject to an action of waste; and therefore it is reason that he should have his remedy by action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff."

3. It seems clear that if Fabyan is to be regarded as a wrongdoer in retaining the possession of the plaintiff's property after his lease had expired, all who aided, assisted, encouraged or employed him to retain this possession, must be regarded as equally tort-feasors, and equally responsible for any damage resulting from his wrongful acts. No more direct act could be done to encourage a tenant in keeping possession, than that of leasing to him the property, unless it was that of giving him a bond of indemnity, such as is stated in this case. In wrongs of this class all are principals, and the defendant, Dyer, must be held equally responsible with Fabyan; and it seems clear that as Dyer could justify in an action of trespass under the authority of Fabyan so as, like him, not to be liable in that action, he must be liable with him in an action upon the case.

Whether the allegations of the declarations are suitable to charge either of the defendants, we have not considered, as the court have not been furnished with a copy.

4. The case of Russell v. Fabyan, 7 Fost. (N. H.) 529, is not to be regarded as a decision of the question raised in this case, in relation to the sale of a supposed right of redemption as belonging to Burnham, after the first levy made upon the property. It was there held, upon the facts appearing in that case, that independent of the question of fraud in Burnham's deed to Russell, all Burnham's right of redeeming the levy, which might be made upon the attachment subsisting at the time of the deed, and of course good against it, passed to Russell. Upon this point there can be no question, and none is suggested. The question then arose, whether, if Russell's deed was proved to be fraudulent as to the creditors of Burnham, the right of redemption did not pass to Dyer by the sale on his second execution, so as to invalidate the tender made by Russell. This question might have been met and decided, but the case did not require it. It was held that whether Russell's title was good or bad, Fabyan, as his tenant, could not dispute it. He could be discharged from his liability to pay his rent, which was the subject of that action, only by an eviction by the lessor, or by some one who had a paramount title to his; a mere outstanding title not put in exercise is not a defense. The defendant relied on an eviction on the 14th of June, 1848, as his defence. The sale of the right of redemption was made on the 31st of July following, and after that date there was no eviction, so that the attempt there was merely to show an outstanding but dormant title, which it proved would be no defence. And the court took the ground that Fabyan stood in no position to raise a question as to the validity of Russell's title, except so far as the opposing title was the occasion of some disturbance of his estate. So far as the principles stated in that case are concerned, they appear to us sound and unanswerable. Whether, if the case had taken a different form, the result would have been in any degree different, it is not necessary to enquire.

By our statute, every debtor whose land or any interest in land is sold or set off on execution, has a right to redeem by paying the appraised value, or sale price, with interest, within one year. Rev. St. c. 195, § 13; Id. c. 196, § 5; Comp. St. pp. 501, 502. This right to redeem is also subject to be levied upon and sold, as often as a creditor supposes he can realize any part of his debt by a sale, until some one of the levies or sales becomes absolute. But these sales have each inseparably connected

with them the right of redemption. If the debtor has parted with his title before the levies are made while the property is under an attachment, that right of redemption is vested in his grantee, who, being the party interested (Rev. St. c. 196, § 14), may redeem any sale or levy, if he pleases; the effect of his payment or tender for this purpose being of course dependent upon the state of facts existing at the time.

So, if there is no attachment upon the property at the time of the debtor's conveyance, but his creditors levy upon the property, upon the ground that his conveyance was not made in good faith, and upon an adequate consideration, and so is fraudulent and void as to them, the effect is the same. Any creditor may levy his execution upon the right of redemption of any prior levy or sale, the deed of the debtor being without legal operation to place either the property itself or any interest in it out of the reach of his process. And the right of redemption, so long as it retains any value in the judgment of any creditor remains liable to his levy; but when the creditors have exhausted their legal remedies, the right of redemption, necessarily incident to every levy on real estate, still remains, and it is the right not of the debtor, but of his grantee, who may exercise it at his pleasure.

This we conceive was the position of the present case. The first levy by Dyer being founded on his attachment, took precedence of Russell's deed; but Russell had still the right to redeem as grantee of Burnham, whether his deed was valid as to creditors or not. When the right of redeeming the first levy was sold, on the ground that the deed to Russell was fraudulent and invalid a right of redemption still remained to Russell, and he had a right, as a party interested in the land, to pay or tender the amount of the first levy to Dyer, and so to discharge it. By that payment or tender it was effectually discharged, whatever might be the rights or duties of Dyer, or Russell, or any one else, growing out of the sale of the right of redemption upon Dyer's second execution, which, being founded upon no attachment, was prima facie a nullity as to Russell, and was dependent for its effect upon the evidence that might be offered, showing Russell's deed void as to creditors.

The present case stands free from any question growing out of the relation of landlord and tenant, as that relation is not alleged, and the lease of Russell had expired, and Dyer had never stood in that relation. The evidence offered that Burnham's deed to Russell was fraudulent as to his creditors, is not open to any objection of that kind, which was held decisive in 7 Fost. (N. H.) 529. If the facts warrant that defence, the evidence is competent; and if it should be shown that the deed to Russell was void as to creditors, and Dyer was one of that class, his second levy was good, if properly made, and the title to these premises passed to him, subject to his prior and any subsequent levy, and to Russell's right of redemption.

As the offer of the defendant to prove Burnham's deed to Russell to be fraudulent and void as to creditors, and as to the defendant, Dyer, as one of them, was refused, there must be a new trial.

TRASK v. GRAHAM.

(50 N. W. 917, 47 Minn. 571.)

Supreme Court of Minnesota. Dec. 24, 1891.

Appeal from district court, Hennepin county; Seagrave Smith, Judge.

Action by Eugene W. Trask against John Graham to recover on a covenant of warranty. Judgment for plaintiff. Defendant appeals. Reversed.

L. L. Longbrake, for appellant. H. P. Herring, for respondent.

VANDERBURGH, J. The record shows that the parties jointly entered into a lease with the St. Anthony Falls Water-Power Company, of the date of May 5, 1885, whereby they rented from the company, by lease under seal, for the term of five years from July 1, 1885, the premises in controversy. By the terms thereof the lessees, Trask & Graham, who were partners, agreed to pay as rent for the premises the sum of $300 per annum, in quarterly installments; and also agreed to assume and pay all real-estate taxes levied on the leased premises during the term of the lease, beginning with the tax for 1885. The lessees jointly, as partners, owned a saw-mill situated upon the leased premises. On the 2d day of February, 1889, the defendant, Graham, in consideration of a contract for the sale of his interest and title in and to the leased premises and the saw-mill situated thereon, entered into between him and the plaintiff, Trask, did, by an instrument in writing under seal, at his request, duly sell and convey all his right, title, and interest in and to the same to one Whitmore, who represented the plaintiff, for the sum of $5,500 consideration paid by the latter, and therein agreed to warrant and defend the title thereto against all lawful claims. For the purposes of this action it is understood that the sale and transfer is to be treated as an independent transaction, and wholly disconnected from other partnership business between the parties or any accounting therefor; and plaintiff, it is admitted, stands in the shoes of Fairchild, as assignee, and succeeded to the sole possession of the premises under the lease as of the date of the transfer. The rent for the current quarter became due April 1st next after the date of the assignment; and the taxes for the year 1888 became payable on the first Monday of January, 1889, but not delinquent until June 1st, but became and were a separate and fixed liability of both lessees then in possession. The plaintiff subsequently paid the rent for the whole quarter, and also the taxes for 1888, and by this action he seeks to recover from the defendant the amount of one-half the taxes for 1888, so paid by him, and also one-half of the rent that had accrued between January 1st and February 2d, the date of the transfer and assignment to him, though not due till April 1st following. As respects the relations of the assignee of a lease, the rule is: "When a covenant relates to or is to operate upon a thing in being, parcel of the demise, the thing to be done by force of the covenant is, as it were, annexed to the thing demised, and goes with the land, binding the assignee to performance, though not named: and the assignee, by accepting possession of the land, subjects himself to all the covenants that run with the land." Tayl. Landl. & Ten. § 437; Spencer's Case, 5 Coke, 16; Blake v. Sanderson, 1 Gray, 332. The foundation of this liability of the assignee is the privity of estate that exists between him and the lessor. The covenant to pay the rent and taxes runs with the land, and the plaintiff, Trask, under the assignment, assumed the liability for the rent and taxes that accrued and became due during his possession as assignee. Van Rensselaer v. Bonesteel, 24 Barb. 365; Post v. Kearney, 2 N. Y. 394. The assignee, being liable solely in privity of estate, is liable only for obligations maturing or breaches occurring while he holds the estate as assignee, and not for those which occurred before he became assignee or after he ceased to be such. Patten v. Deshon, 1 Gray, 329. It follows from the application of these principles to this case that the assignee, Trask, was himself liable for the rent for the whole quarter within which he became assignee, the rent not having yet accrued, and which he must be held to have assumed. And the quarter's rent in such cases is not to be apportioned. Graves v. Porter, 11 Barb. 594, 595. We are unable to see why the same rule does not apply as to the taxes. The covenant to pay was general, and would be satisfied if paid within the year and so as to save the lessor harmless. The lessees would not be in default, at least till the taxes became delinquent, which would not be till June 1st. There had been no breach of the covenant to pay the taxes, and the assignee took the leasehold estate cum onere as to them also. The plaintiff, as assignee, was liable directly to the lessor upon the covenant to pay the taxes. There had been no previous breach of the covenant, and the plaintiff, as assignee, took the place of the lessee in respect to liability upon covenants not yet matured. Mason v. Smith, 131 Mass. 510. It must be presumed that the contract was made in contemplation of the legal relations of the parties, and that the consideration was adjusted accordingly. If the plaintiff, as between them, was not to stand in the place of the defendant, and the defendant was to remain liable for the unpaid rent and taxes not yet due, it should have been so expressed in the contract. Granting, then, that the lien of the taxes attached to the land January 1st, the obligations to pay them under the lease had not yet matured, and there is no covenant against incumbrances or liens on the land. Defendant merely transfers his right, title, and interest in the mill and lease, and this is all the covenant of warranty applies to. He does not warrant the title to the land. Sweet v. Brown, 12 Metc. (Mass.) 177. No breach of the covenant of warranty is shown or relied on. Rawle, Cov. (4th Ed.) 178, note. Order reversed.

NEWMAN v. RUTTER.

(8 Watts, 51.)

Supreme Court of Pennsylvania. May, 1839.

Error to court of common pleas, Lebanon county.

Foster & Weidman, for plaintiff in error. Pearson & Cline, for defendant in error.

ROGERS, J. One of the objections to the judgment of the court of common pleas, is their answer to the fourth point. The court instructed the jury, in answer to that point, that to entitle the plaintiff to enter agreeably to the terms of the deed, it must appear not only that the rent was in arrear and unpaid, but that there was not sufficient personal property on the lot, liable to be distrained, to enable plaintiff effectually to compel payment of the rent by distress. By the terms of the deed it is stipulated that if the rent should be in arrear sixty days, the grantor might distrain; and if a sufficient distress should not be on the premises, that the owner of the rent might enter on the lots and repossess them, as though the deed had not been made. The deed must be construed according to the intention of the parties; and, to entitle the plaintiff to enter, it must appear not only that the rent was in arrear for the time specified, but that upon a distress being made by him, it was found that there was not sufficient property on the premises to pay it. In this point of view, therefore, the defendant rather than the plaintiff, has reason to complain of the charge, as the court put the case upon the fact, whether there was enough of property on the premises to answer the plaintiff's claim. If the plaintiff had pursued his remedy by distress, there were, if the witnesses are to be believed, at all times, goods more than sufficient for that purpose.

But the plaintiff contends that the defendant denied his title, and that this denial amounts to a forfeiture, and that, therefore, he can maintain ejectment. A forfeiture may be incurred either by a breach of those conditions which are always implied and understood to be annexed to the estate, or those which may be agreed upon between the parties, and expressed in the lease. The lessor, having the jus disponendi, may annex whatever conditions he pleases, provided they be not illegal, unreasonable, or repugnant to the grant itself; and upon breach of these conditions may avoid the lease. Any act of the lessee, by which he disaffirms or impugns the title of his lessor, comes within the first class; for, to every lease the law tacitly annexes a condition that if the lessee do anything which may affect the interest of the lessor, the lease shall be void, and the lessor may re-enter. Every such act necessarily determines the relation of landlord and tenant; since to claim under another, and at the same time to controvert his title; to affect to hold under a lease, and at the same time to destroy the interest out of which the lease arises, would be the most palpable inconsistency: Barr. Leases, 119; Woodf. Landl. & Ten. 219. So where the tenant does an act which amounts to a disavowal of the title of the lessor, no notice to quit is necessary; as where the tenant has attorned to some other person, or answered an application for rent by saying that his connection as tenant with the party applying has ceased; Bull. N. P. 96; Esp. N. P. 463. In such cases, as the tenant sets his landlord at defiance, the landlord may consider him either as his tenant, or as a trespasser. But these principles only apply where there is no dispute as to the person entitled to the rent; so where there was a refusal to pay rent to devisee in a will which was contested, it is not such a disavowal of the title as will enable the devisee to treat the tenant as a trespasser, and to maintain ejectment without previous notice. Woodf. Landl. & Ten. 219, and the authorities there cited. These principles are usually applied to the relation which subsists between landlord and tenant on a demise for a term of years; and whether they are applicable to a grant of land in fee with the reservation of a rent charged on the land may admit of doubt, although no case has been cited, and I know of none, where it has been so applied. But however this may be, the doctrine does not hold where there is no denial of the title under which the defendant claims, but it is denied that the plaintiff is the person entitled to receive the rent, although he is the representative or devisee of the original grantor, or where, as in this case, the proportion of the rent, which he owns is disputed. The plaintiff claims the entire rent, and the court and jury have decided that he is entitled to a moiety only. It would, therefore, be a harsh application of the principle to decide that a defence which certainly has some plausibility about it, should work a forfeiture of the estate. Courts of law always lean against a forfeiture, and it is the province of a court of equity to relieve against it. Whenever a landlord means to take advantage of a breach of covenant, so as that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the tenancy, and so operate as a waiver of the forfeiture, as distraining for the rent, or bringing an action for the payment of it, after the forfeiture has accrued or accepting rent: Bull. N. P. 96; Woodf. Landl. & Ten. 227; Barr. Leases, 226. For this reason the court were right in admitting in evidence a receipt from the plaintiff to the defendant for ground rent for the two lots for the year 1831; this evidence was pertinent, because the receipt of rent waives the forfeiture, if any such there was, for neglecting to erect the buildings on the lot, as provided for in the deed.

In deducing title to the ground rents, plaintiff proved that the ground-rent in Newmanstown had been devised by the last will and testament of Walter Newman, to Henry Newman and David Newman, as joint devisees. This of course, vested in Henry Newman, the plaintiff, a moiety

only of the ground-rent reserved in the deeds. For the purpose of proving that he was entitled to the whole ground-rent charged on the locus in quo, he offered in evidence a deed from Magdalena Newman, administratrix of David Newman, deceased, one of the devisees of Walter Newman, to Christian Seibert, dated the 24th of August, 1786, for sixty-three acres of the tract of one hundred and twenty-eight acres, devised to Henry and David Newman, by Walter Newman, the said sixty-three acres including the one-half of Newmanstown; also a deed from Christian Seibert to Francis Seibert, for same, dated the 19th of April, 1793; also the will of Francis Seibert, devising the same sixty-three acres, including one-half of Newmanstown, to Elizabeth, wife of Peter Shoch, dated February 9, 1811, with parol proof that the said Francis Seibert, in the year 1805, or thereabouts, until the time of his death, and those claiming under him since his death, held and exercised exclusive ownership and occupation of the said sixty-three acres, including the one-half of Newmanstown, and that Henry Newman, the other devisee of Walter Newman, and those claiming under him, in the same time, viz., from the year 1805, or thereabouts, to the present time, have exercised exclusive ownership on the remainder of the tract of one hundred and twenty-eight acres, including the other half of Newmanstown, and that the two lots for which this ejectment is brought, are located in that part of the said tract last mentioned; with further parol proof that search has been made in the recorder's office in Dauphin and Lebanon counties, for deed or agreement of partition of the premises and none such has been found.

From the evidence here offered, it is plain that the ground-rent was not divided between the devisees by writ of partition; so that the only question is, was such proof offered as will justify the jury in presuming a deed, grant, or mutual conveyance? The evidence would have proved that the plaintiff had been in the enjoyment and receipt of the entire rent, charged on the premises, for a period of thirty years and upwards, and that they who deduce their title from David Newman, had received the whole ground-rent charged on this portion of the estate. A jury is required, or at least may be advised by a court, to infer a grant of an incorporeal hereditament, after an adverse enjoyment for the space of twenty-one years; and in Hearn v. Lessee of Witman, 6 Bin. 416, it is held, that what circumstance will justify the presumption of a deed, is matter of law; and that it is the duty of the court to give an opinion whether the facts proved will justify the presumption. This presumption seems to have been adopted in analogy to the act of limitations, which makes an adverse enjoyment of twenty-one years a bar to an action of ejectment; for as an adverse possession of that duration will give a possessory title to the land itself, it seems, also, to be reasonable, that it should afford a presumption of right to a minor interest arising out of the land. The ground of presumption, in such cases, is the difficulty of accounting for the possession or enjoyment, without presuming a grant or other lawful conveyance. This is not an absolute presumption, but one that may be rebutted by accounting for the possession consistently with the title existing in another. Here we cannot account for the enjoyment and receipt of the entire rent, without presuming a grant or some lawful conveyance from the one tenant in common to the other; and for this reason we think the court erred in excluding the evidence.

The court were right in admitting the evidence of Job Pearson. The objection goes to his credit rather than to his competency.

Judgment reversed, and a venire de novo awarded.

BEDFORD v. M'ELHERRON.

(2 Serg. & R. 49.)

Supreme Court of Pennsylvania. Sept., 1815.

Wilkins & Campbell, for plaintiff in error. Mr. Baldwin, for defendant in error.

TILGHMAN, C. J. Where a lease is made for a year, and so from year to year, as long as both parties please, there must be notice to quit, in due time, before the end of the year; otherwise, the law implies a new lease for a year. So, where a lease is made to one, to hold during the pleasure of the lessor, there must be due notice to quit; because it would be unreasonable, that a man who has gone to the expense of cultivating land and making preparations for a crop, while his estate was uncertain, should be turned off at a moment's warning. But where the lease is to expire at a certain time, the law is different, because each party knows what he has to trust to; there can be no occasion to give notice to quit, where the lessee has agreed to quit at a certain time.

In the present case, the lessor might have maintained an ejectment at the end of the lease; but there is no evidence that the lessor required the possession at the end of the lease. On the contrary, he permitted the lessee to retain possession for seventeen years afterwards. From this, I think, it may be fairly presumed, that the defendant retained the possession with the consent of the plaintiff; and if so, he was tenant at will, at least, or perhaps, it might be more easily inferred, that he remained tenant from year to year, at the same rent which was reserved by the written lease for four years. But whether he was tenant at will, or from year to year, is immaterial, because, in both cases, notice to quit was necessary. The charge of the president of the court of common pleas was correct, therefore, and the judgment should be affirmed. Judgment affirmed.

BRACKENRIDGE, J., concurred. YEATES, J., absent.

HUNTINGTON v. PARKHURST.

(49 N. W. 597, 87 Mich. 38.)

Supreme Court of Michigan. July 28, 1891.

Error to circuit court, Ingham county; Rollin H. Person, Judge.

Action by Charles G. Huntington against Charles G. Parkhurst to recover for the rent of a store-house. There was judgment for plaintiff, and defendant thereupon took this writ. Affirmed.

Q. A. Smith (A. D. Prosser, of counsel), for appellant. A. B. Haynes (Montgomery & Lee, of counsel), for appellee.

CHAMPLIN, C. J. This action was commenced before a justice of the peace to recover for the use and occupation of certain premises before then claimed to have been leased by the plaintiff to the defendant. The plaintiff had judgment before the justice, and the case was appealed to the circuit court, and there, after hearing the testimony, the court directed a verdict for the plaintiff. We quote, with a few amendments, the statement of facts taken from the supplemental brief of counsel for defendant, namely: The plaintiff was the owner of a store building, in which was contained a stock of goods which had been attached, and was sold by the sheriff at public auction, and purchased by the defendant. When the goods were offered for sale, the plaintiff informed the auctioneer, and he so announced, that any purchaser of the stock of goods might obtain a lease of the store. Immediately after the purchase by the defendant, the plaintiff and he talked together with reference to leasing the store, and it was then agreed between them that the plaintiff would execute to defendant a written lease of the premises for a term of one year, with the privilege of three or five years in addition, for a yearly rental of $500, payable monthly in installments of $41.66. The defendant agreed to accept and enter into such a lease on those conditions, and on account of the lateness of the hour the plaintiff said he would have the lease drawn after he returned home, and they could execute it at some future time. Without any other agreement or understanding, defendant occupied the store two months, and paid the monthly rental of $41.66. The defendant, through his father, during this period of time, requested the plaintiff to execute the lease, who replied that he would do so, but that, the defendant not being present to execute the lease with him, he would have it drawn so that when they came together it could be signed. The term commenced on the 6th day of May, 1890, and the rent was paid to July 6, 1890. On the 3d day of July the defendant removed from the premises. On the Sunday before he had an interview with the plaintiff, in which he told him that he was going to vacate, to which the plaintiff replied that he had rented the store for a year. The defendant, after he had removed from the premises, locked the door, and left the key in a bank with which plaintiff was connected, with directions to deliver it to plaintiff. Plaintiff refused to accept the key or the possession of the premises, and, after the next month's rent became due and payable, brought his action to recover for the use and occupation of the premises.

The first question to be decided is, what was the nature and extent of defendant's holding under the facts above stated? The question so ably argued by defendant's attorney in his original and supplemental briefs, and orally before the court, namely, that the testimony shows that no actual lease was entered into, but that there was an agreement for a lease for a term of one year, with the privilege of three or five years, at an annual rental of $500, payable monthly at the rate of $41.66, does not reach and dispose of the merits of the controversy. The terms of the lease were agreed upon, and it was agreed they should be reduced to writing. This doubtless was an agreement for a lease to be executed according to the terms agreed upon, but the testimony shows further that the defendant went immediately into possession under the agreement that he should have a written lease for one year, with the privilege of three or five years, as above stated, and occupied the premises and paid the stipulated rent for two months. Under such facts, the relation of landlord and tenant was created. The defendant became a tenant at will. It is laid down by Taylor, in his work on Landlord and Tenant, that "where a party enters into the possession of premises under an agreement to accept a lease for twenty months, and subsequently refuses to accept the lease, he becomes by such refusal a strict tenant at will, for he may be ejected immediately; but, if the landlord accepts rent from him monthly or according to the terms of the original agreement, a general tenancy at will is created, commencing from the time of entry;" and "while a man who enters under a void lease is strictly a tenant at will, if he pays rent, he becomes a general tenant at will or from year to year, according to circumstances." Tayl. Landl. & Ten. § 60. In this case the agreement for a periodical rent, and the agreed term of a year, at all events, makes the holding of defendant a tenancy from year to year. See Id. § 56, and cases cited in note 2. Counsel for the defendant claims that an entry under an agreement for a lease is a mere license, and can be terminated by either party before the written lease is executed, and cites Tayl. Landl. & Ten. § 37. The author does make use of the expression that "such an agreement, however, will operate as a license to enter upon the premises agreed to be demised;" but it was not the intention, as I think, of the author, to convey the idea that a person so agreeing for a lease might enter and occupy the premises, and pay rent in accordance with the agreement, without becoming a tenant. The distinction is this: if he enters awaiting the execution of the agreement, his entry is one under a license, but if,

after being in possession of the premises, he pays rent for the use of them in accordance with the agreement, which was to be reduced to writing, his relation is that of a tenant at will; and the distinction is plainly pointed out at the close of the section cited, where the author says: "Any person, however, who may be in possession of land in pursuance of an agreement to let, may, by the payment of rent or other circumstances, become a tenant from year to year." Indeed, it would seem not to require any citation of authorities to prove that when a party, under an agreement for a lease, enters in possession and pays rent for the use of the premises, the relation between the parties cannot be other than that of landlord and tenant; it certainly is not that of licensor and licensee. The tenant has acquired rights of which he cannot be divested without the proper notice, and so has the landlord. The same result follows where a lease is made by parol for a longer term than one year, and the party enters into possession under it, and pays rent, which it is agreed shall be reduced to writing, as it does where a lease is made for a longer term than one year by parol, and is void under the statute of frauds, and the tenant enters and occupies, paying rent, and is ruled by the same principles which apply to the latter class. In such cases it has been uniformly held that an implied tenancy from year to year will arise in cases where occupation is had under a parol demise for more than a year, void because exceeding the period allowed by the statute of frauds. Tayl. Landl. & Ten. § 56. Some cases hold that such a lease, although void for the period beyond a year, is good for one year, because it will be presumed that the parties intended to effect the lease for the term for which one could legally be made; but I think the better reasoning is that a contract which is void by the terms of the statute of frauds is not good for any purpose further than to indicate what the intentions of the parties were with reference to the terms of the letting. The rights of the parties must be judged by the relation they have assumed with each other independently of the void contract. Courts, however, have referred to the contract as throwing light upon the intentions of the parties, and it has been generally held that, where a tenant enters and occupies under a parol lease for more than a year, the agreement may be looked to as showing the terms under which the tenancy subsists in all respects, except as to the duration of the term. Doe v. Bell, 5 Term R. 471; 1 Cruise, Dig. 281–284; People v. Rickert, 8 Cow. 226; Schuyler v. Leggett, 2 Cow. 660; Greton v. Smith, 33 N. Y. 245; Clayton v. Blakey, 8 Term R. 3; Laughran v. Smith, 75 N. Y. 205. In the case last cited, which was an action to recover rent, Andrews, J., said: "But although a parol lease for more than a year is void, yet it has long been settled that, when a tenant enters and occupies, the agreement regulates the terms on which the tenancy subsists in all respects except as to the duration of the term. It is a reasonable inference in such a case, from the circumstances, that the parties intended a tenancy on the terms of the original agreement, and the law implies a new contract between the parties corresponding therewith, so far as it is not in conflict with the statute." In Koplitz v. Gustavus, 48 Wis. 48, 3 N. W. 754, the tenant had gone into the occupation of the premises under a lease which was void under the statute of frauds. It was contended by counsel for the lessees that, as the lease was not in writing and was for a longer period than a year, it was void; that the rent reserved was not annual, but monthly, and payable at the end of each month, on the plaintiff's demand; and that under these circumstances the tenancy created by holding over was one from month to month, and determinable by 30 days' notice. The court, in deciding the case, after stating the position of counsel, said: "But to this it may be answered that there are well-considered cases which decide, under the English statute and statutes which contain similar provisions, that while a parol lease for more than the prescribed period creates, in the first instance, only an estate at will, yet such estate, when once created, may, like any other estate at will, be converted into a tenancy from year to year, by payment of rent or other circumstances which indicate an intention to create such yearly tenancy." In Morrill v. Mackman, 24 Mich. 279, the distinction between a license and a tenancy is clearly pointed out, and it was expressly held that a parol lease for more than a year, reserving an annual rent, under which the lessee has been put into possession, although invalid under the statute of frauds, was good as a lease from year to year, until terminated by notice. The principle in this case was cited with approval and applied in Coan v. Mole, 39 Mich. 454. Schneider v. Lord, 62 Mich. 141, 28 N. W. 773, was a case where there was an unwritten lease for two years from the beginning of the year 1884. The rent was paid monthly for more than a year, and the lessee claimed the right to terminate the lease on a month's notice. The case below was decided on the ground that the tenancy was at will from month to month, and ended by a month's notice to quit. It was, however, held that it was a tenancy from year to year, and not a monthly tenancy at will, and the fact that the rent was payable monthly did not any the less make it a contemplated yearly holding.

In the case at bar the contemplation of the parties was that the holding should be at all events for one year, and with an additional term, depending upon the election of the lessee, and as to this he was a tenant at will from year to year, and not from month to month. If, however, it should be conceded that the tenancy was at will from month to month, still the judgment below was correct. The principles of justice and sound policy require that estates at will should not be terminated, except at the will of either party, and then not without notice. This principle was long since embodied in our statutes, and,

with some recent modifications in respect to notice, reads as follows: "Sec. 4304. All estates at will or by sufferance may be determined by either party by three months' notice given to the other party; and, when the rent reserved in a lease is payable at periods of less than three months, the time of such notice shall be sufficient if it be equal to the interval between the times of payment; and such notice shall not be held void by reason of its mentioning a day for the termination of the tenancy not corresponding to the conclusion or commencement of any such period, but in any such case the notice shall be held to terminate the tenancy at the end of a period equal in time to that in which the rent is made payable. And, in all cases of neglect or refusal to pay rent on a lease at will or otherwise, seven days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease. And in all cases of tenancy from year to year a notice to quit, given at any time, shall be sufficient to terminate said lease at the expiration of one year from the time of the service of such notice." Pub. Laws 1885, Act No. 162. The entry of defendant into possession under the terms of the agreement for a lease before it was executed, and paying rent in accordance with the agreement, created the relation of general tenancy at will, and could not be terminated by either party without notice to the other, and the tenant cannot, without justifiable cause, abandon the premises, and treat it as a surrender, without his giving the notice required by the statute. Walker v. Furbush, 11 Cush. 366; Whitney v. Gordon, 1 Cush. 266; Thomas v. Nelson, 69 N. Y. 118; Batchelder v. Batchelder, 2 Allen, 105; Schuyler v. Smith, 51 N. Y. 309; Koplitz v. Gustavus, 48 Wis. 48, 3 N. W. 754. The record does not show that defendant had any justifiable cause for abandoning the premises. They were not in fact or law surrendered. Vacating the premises before the expiration of the term, and offering the key, which is refused, is not a surrender. The testimony shows that defendant paid rent to July 6th, vacated the premises July 3d, and on the Sunday previous, namely, June 29th, told the plaintiff he should move out, and plaintiff insisted that the store was rented for a year. Aside from the question whether notice given on Sunday would be valid, it plainly appears that it was entirely insufficient to terminate the tenancy, even if the holding was from month to month, and it follows as a natural consequence that until the tenancy is terminated the defendant is liable for the use and occupation of the premises.

The position is taken by counsel for the defendant that a tenant going into possession under a void lease cannot be compelled to pay rent for any longer period than he actually occupies, and in support of that position the case of Thomas v. Nelson, 69 N. Y. 118, is relied upon, and the following syllabus of that decision is cited: "It seems that a parol lease, void under the statute of frauds because for a longer period than one year, is not valid for that period. If a tenant enters and occupies under it, he may be compelled to pay for the use and occupation, but cannot be compelled by virtue of the lease to pay for a longer period than he actually occupied." The facts of that case are stated in the opinion. The plaintiff alleged a lease for seven years. On the trial he proved a memorandum made by himself in which he stated that he was to give Mr. Nelson a lease of the building 271 Broadway for seven years, the first three years at $1,400 a year, and four years at $1,500 a year. It was said that the memorandum did not embody the contract between the parties, and was not intended to. It simply embraced the main features of the lease, and plainly indicated that a formal lease was subsequently to be executed embodying the agreement which the parties had made. The plaintiff was permitted to show a parol agreement for a lease of seven years, and the terms upon which the parties had agreed. The court ruled upon the trial below in his charge to the jury that such a lease, although invalid for a term of seven years, was valid for a term of one year. Under these rulings there was no exception, and Mr. Justice Earl, in delivering the opinion of the court of appeals, said: "While such a contract is void, yet if the tenant enters into and occupies he may be compelled to pay for the use and occupation of the premises, [citing authorities;] but it is difficult to perceive how such a contract, declared to be void by the statute, can be held to be valid for a single hour, or upon what principle a tenant entering under a void lease could be compelled by virtue of the lease to pay for a longer period than he actually occupied." This probably is the language from which the syllabus was composed, but a further reading of the opinion will disclose that what the court meant by actual occupation was an occupation under the tenancy, and until it had been legally terminated; for in the next clause the court proceeds as follows: "In August the defendant moved away from the premises, and sent the keys of the house to the plaintiff in a letter, and they were not returned. He claimed upon the trial that the retention of the keys was an acceptance of the surrender of the premises. The plaintiff was not bound to seek the defendant, and tender the return of the keys. The court held that the mere retention of the keys, which were sent to him without his request or assent, did not amount to a surrender and acceptance, and in this there was no error." So that it plainly appears that a tenant at will, until the tenancy is legally terminated by notice, is bound to pay for the use and occupation, and that the mere vacating of the premises during the term, or while the tenancy exists, does not exonerate him from the payment for the use and occupation of the premises until the relation of landlord and tenant is legally terminated. The judgment must be affirmed. The other justices concurred.

LADD v. BROWN.

(53 N. W. 1048, 94 Mich. 136.)

Supreme Court of Michigan. Dec. 22, 1892.

Error to circuit court, Jackson county; Erastus Peck, Judge.

Replevin by Henry A. Ladd against David Brown. Judgment for defendant. Plaintiff brings error. Reversed.

Thomas A. Wilson, for appellant. Blair & Wilson, for appellee.

MONTGOMERY, J. The defendant leased a farm in Norvell township, Jackson county, of one George Ladd, under an agreement to pay 5 per cent. of the valuation as annual rental. After some years of occupancy by defendant, George Ladd died, in May, 1887, leaving as his heirs at law the plaintiff and one Alice M. Ladd, a minor child of another son. The defendant was appointed administrator of the estate of George Ladd, and continued to occupy the premises in 1887 and 1888. In rendering his account as administrator, he accounted for the rental of the farm, and charged himself $280. This sum was fixed by the probate judge after a hearing. In 1890 he sowed 12 acres of wheat and 16 acres of rye. He left the place before April 1, 1891, and plaintiff took possession. Defendant afterwards went on the premises, and reaped the crop. Plaintiff brings replevin.

The plaintiff's testimony tended to show that when the defendant took possession it was agreed on his part with George Ladd that the defendant would at the end of his term leave on the ground the same quantity of wheat as was then growing,—about 25 acres. Defendant testified that in the fall of 1888, before he put in the wheat in question, "I told him I would not think of putting in any wheat unless I had the right to come back and harvest it after I left the place,—if I could have that privilege to come back and harvest it. I told him if we were going to have any trouble I would not think of putting in the wheat. He said he did not think there would be any trouble, and that he owned one half of the place, and would probably own the rest before the wheat was harvested, and there would be no trouble. This was in front of plaintiff's house. He asked me if I had plowed any, and I told him no, I didn't know as I should, and that brought up the question about sowing the wheat. That talk was, I think, along in the fore part of August. I plowed after that. He knew I was plowing and sowing the ground." The circuit judge charged that, "If the defendant, Brown, in substance said to Mr. Ladd, the plaintiff, 'I will not put in the crops unless I can harvest and take them off,' and Mr. Ladd, in reply, said, in substance, 'There will be no trouble about that; I own one half, and expect to purchase the other half;' and if you further find that when Mr. Ladd made that statement he expected Mr. Brown to rely upon it and act upon it in putting in the crops; and if you also find that Mr. Brown did so rely upon it and act upon it, and would not have put in the crops except for such statement by Mr. Ladd,—now, in that condition of facts, Mr. Ladd cannot insist upon having the crops, and your verdict should be for the defendant. If, on the other hand, the evidence does not establish such a condition of facts, Mr. Ladd, the plaintiff, is entitled to your verdict."

We think there was error in ignoring the testimony offered by the plaintiff tending to show that the defendant was legally bound to do what he claims to have done under the plaintiff's assurances. To so apply the doctrine of estoppel as to render an agreement, otherwise void for want of consideration, valid and binding, is to accomplish by indirection what cannot be done directly. The doctrine of estoppel is applied to prevent injustice, not to relieve parties from the obligations of their contracts; and the conduct of the party claimed to have been estopped must have been such as to have misled the party setting up the estoppel into a course to his prejudice, or inducing him to do what he otherwise would not have done. Burdick v. Michael, 32 Mich. 246. In this case, if the defendant was induced to do no more than he had, before the alleged promises of plaintiff, undertaken upon sufficient consideration to do, it cannot be said that he was misled to his prejudice, and induced to do what he otherwise would not have done, unless it was to his prejudice to fulfill his contract, which is of course not true. 3 Am. & Eng. Enc. Law, p. 834, and cases cited in note 4.

It is claimed by the appellant that, as the growing wheat was an interest in real estate, an estoppel could not be created by parol. We do not consider that the case presents this question. It was competent for the plaintiff to assent to an occupancy of land for a period of less than one year by parol, and this is the effect of the agreement, as testified to by defendant; and, if such agreement had been made upon sufficient consideration, we do not doubt that it could be enforced. In this case, if the testimony offered by the plaintiff tending to show that there was an agreement on the part of defendant to leave crops upon the ground corresponding to those which were growing at the time he took possession is true, there was no consideration for the engagement alleged to have been made by the plaintiff, and the jury should have been so instructed.

Judgment will be reversed, with costs, and a new trial ordered. The other justices concurred.

WINEMAN v. PHILLIPS et al.

(53 N. W. 168, 93 Mich. 223.)

Supreme Court of Michigan. Oct. 4, 1892.

Appeal from circuit court, Jackson county, in chancery; Erastus Peck, Judge.

Bill in equity by Henry Wineman against Mary Ann Phillips and Richard G. Phillips. From a decree for defendants, complainant appeals. Reversed.

Griffin, Warner & Hunt, for appellant. A. E. Hewett (Eugene Pringle, of counsel), for appellees.

McGRATH, J. On the 4th day of January, 1886, defendants leased from complainant the Madison House, at Detroit, for five years and three months, at an annual rental of $2,400 for the first three years, and $2,700 for the rest of the term, payable in monthly installments in advance. Defendants at the same time purchased from complainant the hotel furniture for $1,050, paying $300 down, and agreeing to pay $100 per month after July 1, 1888, until the whole was paid. The lease provided that defendants would pay all water taxes and assessments; keep the plate glass as well as the hotel effects and furniture insured for complainant's use and benefit; and, to secure the performance of the conditions and agreements of the lease on their part, defendants should execute a chattel mortgage upon the effects and furniture purchased, and a real-estate mortgage upon certain real estate owned by defendant Mary Ann Phillips, in Jackson. The lease provided that it should not be assigned without complainant's consent. The agreement provided that, when the furniture should be fully paid for, the real-estate mortgage should be discharged. The lease was executed and acknowledged by complainant and the defendants on the day of its date, and defendants went immediately into possession under it. The mortgages provided for in the lease were afterwards, on January 18, 1886, executed and delivered. The condition of the real-estate mortgage was the payment of the balance due upon the furniture, and that of the chattel mortgage was the performance of the condition of the lease. Defendants occupied the premises until November 15, 1887, at which time they were in arrears for rent, and had made no further payments upon the furniture. On that date defendants, by a written instrument, assigned to Murray Dalziel the lease aforesaid, and defendants' interest in the hotel furniture, subject to all the terms and conditions of the said lease, and subject to all liens and incumbrances existing thereon. Murray agreed to pay to defendants $1,000, of which $500 was to be paid down, and $500 in two years. Murray assumed and agreed to pay "all such rent upon said premises as may be now in arrears, and all liabilities against the said 'Madison House,' so called, created and existing on hotel account, and accruing within the period of one year last past; and the said second party hereto does hereby further assume and agree to carry out and perform all the conditions of said lease entered into on said 4th day of January, 1886, between said second and third parties, hereto, and to pay the rent as therein provided, subject, however, to such modifications as may be made in respect thereto by said second and third parties, and all liabilities existing on account of the sale of the furniture as in said lease provided, in accordance with the terms and conditions of said lease, and in all respects relieve the said Richard G. Phillips and Mary Ann Phillips from their obligations in respect thereto." The said assignment was executed by defendants, Dalziel, and complainant, and contained the following clause: "And the said Henry Wineman, party of the third part hereto, does hereby consent to the assignment and transfer of said lease by said Phillips and wife to him, (said Dalziel,) as above provided." On the same date complainant entered into a written agreement with Dalziel, reducing the rent to $150 per month. Dalziel occupied till July 1, 1888, at which time he left the city and went to Jackson. It is not claimed that he, at that time, surrendered the house to complainant, and that complainant leased to one Walsh; but the answer sets up that Dalziel, at that time, made some kind of a transfer of the said hotel property, including the said furniture and fixtures, to one Walsh, who took possession and occupied the same for one month and more. On or about the 1st of August, 1888, Dalziel came back to Detroit, and again took charge of the house, at a reduced rent of $30 per week. Dalziel remained until the last of December, 1888, and then surrendered possession to complainant, who foreclosed the chattel mortgage, and at the foreclosure sale bid in the hotel effects and furniture for $1,000, credited that amount upon arrearages for rent, and filed his bill to foreclose the mortgage upon the Jackson property for the amount unpaid upon the furniture.

The defendants insist (1) that, by agreement between the parties, they were to be released from liability, and Dalziel was to be substituted at the time of the assignment to Dalziel; and (2) that when Dalziel, August 1, 1888, took possession, it was expressly agreed that the then existing indebtedness should be canceled, and the defendants released from liability, and that at that time Dalziel made a new contract for the purchase of the furniture, at and for the price of $1,000. The answer does not set up any agreement to release defendants, entered into at the time of the transfer to Dalziel, but sets up that, on July 1st, Dalziel made a transfer of the hotel property to

Walsh; that Walsh took possession and paid the July rent; that afterwards complainant and Dalziel arranged that the old lease should be canceled; the hotel property should be surrendered to and become the property of complainant; that, in consideration thereof, complainant should cancel the old indebtedness; that complainant should oust Walsh, and complainant should make a new lease to Dalziel; that said arrangement was carried out; that Dalziel continued in possession under said lease, as tenant of both hotel and furniture, until December following, when he surrendered the property to complainant, who has since sold it, and leased the premises as his own; that in making said settlement and arrangement of August 1, 1889, defendant Mary Ann Phillips "assumed, in the absence of her husband, to act and agree for them both, and that what she did in the making of said settlement was assented to by her said husband, only with and upon the express understanding that the said settlement included the cancellation of the said indebtedness of $1,350 and the interest, as well as of the demands growing out of the said lease, and not otherwise."

The first claim is entirely inconsistent with this answer. Dalziel was the son-in-law of defendants, and, although not his answer, it was made after full consultation with him. Mrs. Phillips testified that she was present when the arrangement of August 1, 1889, was entered into between Wineman and Dalziel, and with reference to it she says: "We were talking about the Walshes, and Mr. Wineman said that the Walshes would never suit his house; he didn't like their character. And I told him, 'No, I didn't think they would suit myself;' and he told Mr. Dalziel he would very much like him to take the house back again. Dalziel said he would, provided that I would turn over all the furniture, and provided he would release Phillips of all the indebtedness and incumbrance; then, if he would do that, he would give Wineman $1,000, and $25 a week rent. Mr. Wineman said he would not take the $25 a week rent, but he would $30, and Mr. Dalziel said that he did not believe he could give him $30, but it appears they consented to it afterwards." Dalziel says: "Mrs. Phillips said she wanted that part distinctly understood, that she, the Phillipses, were released of all obligations; that was the point that was thoroughly understood." If on November 15, 1887, defendants were to be released, why any further agreement on August 1, 1888? Complainant denies any agreement to release defendants at any time, and all of the testimony of defendants and Dalziel, respecting any agreement to release, relates to conversations prior to the execution of the tripartite agreement, dated November 15, 1887. Two papers were executed at that time,—the tripartite agreement or assignment to Dalziel, and the agreement between complainant and Dalziel, respecting the reduction of the rent. Neither of these papers—and one of them contained the agreement that, as between defendants and Dalziel, the latter should pay these arrearages—refers to any release of the defendants. It must be held that whatever agreements were made by these parties were merged, and are set forth in this tripartite agreement.

Respecting the alleged new agreement of August 1st the $1,000 which Dalziel and Mrs. Phillips claim was to be paid to Wineman is not mentioned in the answer. It is claimed that, by this agreement, the original agreement or lease, the chattel mortgage, the real-estate mortgage, the tripartite agreement, and the subsequent agreement with Dalziel were all canceled and wiped out, and the defendants were to be released from a valid claim against them for $2,000; yet there is not a single stroke of a pen to indicate such an agreement or such a purpose. Dalziel, according to his story, was to pay $1,000 to Wineman. He does not pretend to say when it was to be paid. If no time was fixed, it was to be a cash payment; yet it was not paid, and Dalziel occupied the hotel for five months thereafter, and he does not pretend to say that the matter of its payment or of its nonpayment was ever once alluded to. Can it be urged that Wineman released a secured claim of over $2,000, sold, turned over, and delivered to Dalziel this entire furniture for Dalziel's unsecured promise to pay $1,000, without note or memorandum, and that for five months the question of the payment was never alluded to? Wineman does not appear to have done business in that way. The record shows that he was methodical, and, when he made an agreement, he usually put that agreement into writing.

It is claimed, however, that after August 1, 1888, some weekly receipts were given by Wineman, which read, "In full for rent to date," and one of the receipts was produced. Wineman was a man then 70 years old. This receipt was drawn by Dalziel. Wineman's explanation is entirely satisfactory. Dalziel had, on a few occasions, handed over the counter the week's rent, with a receipt already prepared, and this occurred three or four times. Wineman did not read the first two or three of these receipts, but, on glancing over the last before signing, he noticed the language, "In full for rent to date." He immediately remonstrated, and asked to see the other receipts, which Dalziel laid out on the counter or table. Wineman picked out three that had been drawn by Dalziel, insisting that Dalziel knew that was not right, and offering other receipts for them. Dalziel took one of the three, saying that he wanted to retain one of them for a copy. Wineman took the other two without objection or remonstrance from Dalziel. When

asked if he did not say that he wanted to keep one for a copy, Dalziel says: "I don't know that I used those exact words. I know I told him that I intended to keep that one." Thus we find Wineman at this early day (September, 1888) insisting that there were arrearages, whereas, if Dalziel's claim is correct, there were no arrearages; yet he does not remonstrate with complainant. It was not claimed that the receipts which Wineman had prepared were so written, or that he had read and understood those which Dalziel had prepared. Wineman's conduct is everywhere consistent with his theory. Dalziel abandoned the premises December 31, 1888, and on January 4, 1889, notices were posted of the foreclosure sale of the furniture under the chattel mortgage. It is bid in by complainant, and sold again for the same amount.

The bill herein sets forth that, prior to the giving of the mortgage to complainant, Mary Ann Phillips had given a mortgage upon this Jackson property to another party; that in September, 1888, intending to cut off complainant's rights, she procured the said mortgage to be foreclosed, and the property sold under the statute; that on the day of the sale she gave to her son, George L. Phillips, the amount due on said mortgage, and instructed him to bid in the property in his own name, but in her interest, which he did; that afterwards, in April, 1889, said George L. Phillips conveyed said property to his wife, Mary Phillips, for a nominal consideration; that said Mary Phillips was not a bona fide purchaser of said property. The bill makes George L. Phillips and Mary Phillips parties defendant, and prays that the said property may be decreed to be that of Mary Ann Phillips, and subjected to sale as such. The answer admits the allegations of the bill, in that regard, except that it is alleged "that the sole and only reason why she expected to better her title to her lands by means of a foreclosure sale had reference to claims under tax titles which she supposed were made against her, and not in any way for the purpose or with a view to the defeating of the rights of the said complainant under his mortgage; and she further says that she took such action as is mentioned in the said bill without legal advice, and with no other purpose than to have the said lands conveyed to herself by the said George L. Phillips, after the time for the redemption thereof should have expired." This explanation is an unsatisfactory one. This proceeding is inconsistent with the theory that on August 1st, preceding, this property had been released from complainant's claim against it. The proofs, therefore, fail to show a release or discharge of the mortgage in question.

It is insisted, however, that the mortgage is invalid, for the reason that the original agreement contemplated a partnership, which could not lawfully exist; that the property purchased for partnership uses belonged to the husband. The agreement entered into between complainant and defendants was not a partnership agreement. It was for a lease of certain premises, and the purchase of certain personal property. The consideration that passed was certain personal property, and a lease of certain real property. On the execution of the papers, and delivery of possession, defendants became joint owners of the personal property, and joint owners of the leasehold. The lease and purchase did not necessarily involve a partnership between defendants. A consideration then present and existing passed to her as virtually as though a deed of the premises, instead of a lesser estate, had been executed and delivered. This mortgage was given to secure the unpaid purchase money for property, the title to which vested in herself and husband jointly. A married woman may become a joint debtor with her husband, and upon a proper consideration. Post v. Shafer, 63 Mich. 85, 29 N. W. 519. Dalziel is not a necessary or an indispensable party defendant. An inquiry as to the equity existing between Dalziel and defendants was not important. The assignment of the lease to Dalziel did not operate to discharge defendants; no new leasing was made; no understanding that defendants should be released; no acts done from which an intention to release could be inferred. Stewart v. Sprague, 71 Mich. 50–57, 38 N. W. 673; Bailey v. Wells, 8 Wis. 141. The decree of the court below is reversed, and a decree entered here for complainant in accordance with the prayer of the bill, with costs of both courts.

MORSE, C. J., did not sit. The other justices concurred.

WARNER v. BENNETT et al.

(31 Conn. 468.)

Supreme Court of Errors of Connecticut. April, 1863.

E. W. Seymour, for plaintiff in error. Mr. Graves (with whom was Hollister), for defendant in error.

SANFORD, J. In our opinion the conveyance from Tomlinson to Bennett and others was of a fee simple estate upon condition expressed in the deed. The instrument is a common deed of bargain and sale to the grantees, their heirs, and assigns forever, for certain uses specified in the deed, which contains the following clause: "The conditions of the within deed are such that whenever the within named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever except such as are described in said within deed, the said grantees forfeit the right herein conveyed to the within described premises, upon the grantor paying to the said Hatch and Bennett and other stockholders the appraised value of such buildings as may be thereon standing."

Blackstone says, estates upon condition "are such whose existence depends upon the happening or not happening of some uncertain event whereby the estate may be originally created or enlarged, or finally defeated." 2 Bl. Comm. 151. Littleton says, "It is called an estate upon condition because that the estate of the feoffee is defeasible if the condition be not performed." Co. Litt. § 325. "A condition is created by inserting the very word 'condition' or 'on condition' in the agreement." 1 Bouv. Inst. 285. Conditions are precedent or subsequent. "Precedent are such as must happen or be performed before the estate can vest or be enlarged. Subsequent are such by the failure or non-performance of which an estate already vested may be defeated." 2 Bl. Comm. 154. In the case of a condition "the estate or thing is given absolutely without limitation, but the title is subject to be divested by the happening or not happening of an uncertain event. Where, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation." 2 Bouv. Inst. 275; 2 Bl. Comm. 155.

In the case before us the estate vested in the grantees upon the delivery of the deed, to have and to hold to them, their heirs and assigns, not until they should convert the property to other uses than those specified in the deed, nor so long as they should continue to use it for the purposes specified, but forever; with a proviso or condition expressed in the deed, that if they should convert the property to other uses they should forfeit their estate. The words employed are most appropriate and apt to make an express condition in deed. They are "the conditions of the within deed are such," etc. And in Portington's Case, 10 Coke, 41a, it is said that "express words of condition shall not be taken for a limitation." It has indeed been held that they may be so taken where the estate is limited over to a third person upon the breach or non-performance of the condition (Fry's Case, 1 Inst. 202) but there is no such limitation over in the case before us. So when it is said that "whenever the within named premises shall be converted to any other use," etc., "the grantees forfeit the right herein conveyed," it is clearly indicated that the estate thus forfeited by the misappropriation is to be cut off before the time originally contemplated for its termination by the parties.

But it is said that by the terms of the instrument the forfeiture depends not merely upon the misappropriation of the property by the grantees, but also upon the grantor's payment of the appraised value of the building. Suppose it is so, how can that affect the question whether this is a condition indeed or a limitation? No matter how many events the forfeiture depends upon, nor how many individuals must act in producing them, when all those events concur and co-exist the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual. But the payment for the building was not an event upon which the forfeiture depended. It was merely a duty imposed upon the grantor by the contract in addition to that which the law imposed, to enable him to take advantage of the breach of condition and enforce the forfeiture. His legal obligation to enter for breach of the condition was in no wise affected by it. The estate conveyed by the deed was not an easement, or any other right or interest in the property less than a fee simple. The fact that the instrument was signed by both of the parties to it is of no importance. They were neither more nor less bound by the stipulations and conditions contained therein by reason of such signature. The instrument contains no contract on the part of the grantor to pay for the building. The provision upon that subject operates as a qualification of the grantor's right to enforce the forfeiture and regain his property, but operates in no other way. But for that provision the estate granted could have been put an end to, and revested in the grantor, by an entry only; under that provision an entry could be made available only by payment for the building also.

We think it clear that the estate of the grantees was an estate on condition in deed, and that it was an estate upon condition subsequent; and hence, notwithstanding a breach of the condition by reason of which the estate might have been defeated, it must continue to exist in the grantees, with all its original qualities and incidents, until the grantor or his heirs by an entry (or its equivalent, a continual claim), have manifested in the way required by law, their determination to take advantage of the breach of condition, to avail themselves

of their legal rights, and to reclaim the estate thus forfeited.

The law upon this point is thus laid down by Professor Washburn, in the first volume of his treatise on Real Property (page 450), with accuracy and precision. "A condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and until that is done it loses none of its original qualities or incidents." See, also, Id. 452; 2 Bl. Comm. 155; 2 Cruise, Dig. 42.

But there is in this bill no allegation that an entry for condition broken was ever made. No right to maintain this suit is disclosed, no title to the property is set up, nothing is claimed but a right of entry for condition broken. And for this reason, if for no other, the bill is insufficient, and the decree must be pronounced erroneous.

The allegation in relation to an abandonment of the property is immaterial. It is not averred that the grantees had abandoned the property, but only that they had abandoned it "so far as the uses named in said deed are concerned;" that is, that they had ceased to use the property for the purposes for which the grant was made, not that they had ceased to use it altogether. What effect an absolute and entire abandonment of the property by the grantees would have had upon the legal or equitable rights of this petitioner, we are not now called upon to decide.

Secondly. A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so. 2 Cruise, Dig. 4; 4 Cruise, Dig. 113; 1 Spence, Eq. Jur. 153; 1 Swift, Dig. 93. The grantor or his heirs only can enter for breach of such condition. 1 Washb. Real Prop. 451; 2 Cruise, Dig. 44. The petitioner therefore could have obtained no right or title to make an entry for breach of the condition, and without such entry the estate of the grantees could not be terminated, and no suit at law or in equity could be maintained against the occupant of the property.

Thirdly. If there was a breach of the condition and a forfeiture of the grantees' estate in consequence, and if a right of entry could be and was in fact assigned to the petitioner, still the petitioner could not obtain the relief for which he seeks in a court of equity, because that court never lends its aid to enforce a forfeiture. 4 Kent, Comm. 130; 2 Story, Eq. Jur. § 1319; Livingston v. Tompkins, 4 Johns. Ch. 415.

Lastly. If the right, title or interest, whatever it was, of the grantor or his heirs was assignable, and was assigned to and vested in the petitioner, as he claims, he had no occasion to come into a court of equity for relief. We do not see why he might not have entered for breach of the conditions, requested the respondent to unite with him in procuring an appraisal of the building, if he refused, procured such appraisal without the respondent's co-operation, tendered the amount of the appraisal, and brought his action of ejectment. The petitioner's legal right, if he had it, to put at an end to the grantees' estate and obtain possession of the property, we think could have been defeated by the respondent's refusal to co-operate in the appraisal or accept the tender. See 1 Swift, Dig. 295; Powell, Cont. 417; Whitney v. Brooklyn, 2 Conn. 406. We know of no power in a court of equity to compel the respondent to join the petitioner in procuring an appraisal, nor to make one, in such a case as this; and we see no occasion for the exercise of such a power if it exists. We think the petitioner has an adequate remedy for the enforcement and protection of all his rights at law.

There is manifest error in this record.

In this opinion the other judges concurred, except DUTTON, J., who, having tried the case in the court below, did not sit.

HENDERSON et al. v. HUNTER et al.[1]

(59 Pa. St. 335.)

Supreme Court of Pennsylvania. Jan. 4, 1869.

J. Barton, for plaintiffs in error. White & Slagle, for defendants in error.

AGNEW, J. This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867.

The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitation of the use itself.

It is for the erection of "a house or place of worship for the use of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which, from time to time, may be agreed upon and adopted by the ministers and preachers of the said church at their general conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed, and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith, in his work on Executory Interests (page 12), "is a qualification serving to mark out the bounds of an estate, so as to determine it ipso facto in a given event without action, entry or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "whilst" and "during," as when land is granted to one so long as he is parson of Dale, or while he continues unmarried, or until out of the rents he shall have made £500. 2 Bl. Comm. 155; Smith, Ex. Int. 12, 2 Coke, 12P–121; Fearne, Rem. 12, 13, note, p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion ipso facto returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action, hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the general conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and according to the rules and discipline then existing; for a mere temporary suspension of services there, or a discontinuance of the use without authority, would not ipso facto determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential.

Judgment affirmed.

[1]Irrelevant parts omitted.

HELM v. BOYD.

(16 N. E. 85, 124 Ill. 370.)

Supreme Court of Illinois. March 27, 1888.

Appeal from circuit court, Wabash county; C. C. Boggs, Judge.

This is a bill in chancery filed in the circuit court of Wabash county by the appellee, Helen G. Boyd, against the appellant, James M. Helm, who is her brother. Appellee, whose maiden name was Helen G. Helm, inherited from her mother, who died in July or August, 1874, one-seventh of a tract of 742.41 acres in Wabash county, and one-seventh of a part of block 18, in the town of Grayville, in White county. By a quitclaim deed dated and acknowledged January 10, 1882, and recorded on June 9, 1884, in White county, and on January 21, 1885, in Wabash county, appellee and her husband, James S. Boyd, conveyed the said one-seventh interest in said property to John J. Helm, appellee's father, for an expressed consideration of $1,000. By a quitclaim deed dated and acknowledged January 17, 1885, and recorded January 21, 1885, John J. Helm and his wife, Annie V. Helm, (the latter being appellee's step-mother,) conveyed said interest for an expressed consideration of $1,000 to the appellant, John J. Helm's son, reserving to John J. Helm the use and benefit of said premises during his life. Appellee alleges in her bill that her one-seventh of said property was worth $3,000 on January 10, 1882; that on that day her father loaned her $1,000, without interest, and that she and her husband made the quitclaim to him to secure such loan; that the deed was not intended by her and her father to be an absolute one, but that it was expressly agreed between them that he should hold the deed and the land as security for the loan, and should reconvey the land to her upon repayment of the $1,000; that when her father deeded her interest to defendant, her brother, the latter had due notice and full knowledge of her rights, and of the terms on which her father held the property; that it was expressly agreed between her father and the defendant that she should have the right to redeem upon paying defendant $1,000, with legal interest; that defendant, since the death of John J. Helm, their father, in March, 1886, has collected $300 of rents; that on December 2, 1886, she tendered to defendant $1,000, with legal interest, and offered to pay him what was due to him, but he refused to accept the money or reconvey the premises. The bill prays for an account, and that, upon the payment to defendant of the amount due him, he may be required to reconvey, and deliver possession of the premises to the complainant. The answer admits the original ownership by complainant, and the execution of the quitclaim deeds, but denies that the deed to John J. Helm was made to secure a loan, and claims that it was made to carry out a sale of the property, and that John J. Helm paid complainant $1,000 as purchase money. The answer also denies that when the defendant took the deed from his father he had any notice of complainant's alleged interest in the premises, and claims that he bought the property in good faith, and paid $1,000 for it, and that $1,000 was its full value; and furthermore denies that defendant agreed to allow complainant to redeem, or that he collected $300 of rents. The answer claims the benefit of the statute of frauds. Replication was filed to the answer, and the cause was heard upon bill, answer, replication, and proofs taken and filed. The circuit court found the allegations of the bill to be true, and decreed that appellee should pay to appellant, within 60 days, $992.40, with 6 per cent. interest from May 26, 1887, till paid, and that thereupon appellant should convey all his right, title, and interest in the premises to appellee, and upon his failure to make such conveyance within 20 days after such payment, it was ordered that the master make the deed, etc.

Bell & Green and Thomas G. Parker, for appellant. J. R. Williams, for appellee.

MAGRUDER, J. (after stating the facts). The first question is whether the deed from appellee and her husband to her father, John J. Helm, was an absolute conveyance or a mere mortgage security. The statute says: "Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage." Starr & C. Ann. St. p. 1636, c. 95, entitled "Mortgages," § 12. A deed absolute on its face may be shown by parol to be a mortgage. The law will, however, presume, in the absence of proof to the contrary, that such a deed is what it purports to be,—an absolute conveyance. The party who claims an absolute deed to be a mortgage must sustain his claim by proof sufficient to overcome this presumption of the law. Before a deed absolute in form will be held to be a mortgage, the evidence must be clear, satisfactory, and convincing. It must be made to appear clearly that such a conveyance was intended to be a mortgage at the time of its execution. The question is one of intention, to be ascertained from all the circumstances. Sharp v. Smitherman, 85 Ill. 153; Bartling v. Brasuhn, 102 Ill. 441; Bentley v. O'Bryan, 111 Ill. 53; Workman v. Greening, 115 Ill. 477, 4 N. E. 385.

An examination of the testimony is necessary in order to see what the real intention of the parties was. It is not clear from the evidence whether appellee's mother died before or after July 1, 1874. But it is admitted by counsel on both sides that John J. Helm had a life-interest as tenant by the curtesy in the one-seventh part of the premises in question, which appellee inherited from her deceased mother. When she deeded her one-seventh interest to her father, on January 10, 1882, she was only 20 years old, and had been married only about six months. Appellee swears that her father proposed to her to advance $1,000 to her husband, James S. Boyd, to start him in business; that her father said he did not want the land, and that the payment

of the $1,000 was merely an advancement made to help her and her husband, and that it would all come back to her; that he told her the land had been left to her by her mother, and should all come back to her and her children; that she never asked her father for money when he proposed to advance money on the land; that she never offered to sell the land to him, and he never offered to buy it; that when she signed the deed he said to her: "You and Jim are young yet, and I merely do this to have a little jurisdiction over it. As for the deed being recorded, there shall never be a scratch of the pen against your property. As far as the $1,000 is concerned I will make that right with the other children;" that in July, 1885, when she learned that her father had recorded the deed from her, and had made a deed of the land to her brother, the appellant, she asked him about it, and he replied: "I transferred to Jimmy Helm under the same conditions that I got it from you, and he is to let you have it back. I did it to keep Annie [the second wife] and her children from getting a foothold; * * * your brother will do what is right;" that when she made the deed to her father, she did not know how much land she owned or was conveying, or anything about its value; that an hour after she made the deed, her father paid $500, and the balance in small amounts from time to time; that there was no agreement between her and her father about paying him the $1,000," etc.

James S. Boyd swears that in November and December, 1881, and again about January 1, 1882, John J. Helm proposed to advance money to him to go into business by buying an interest in a printing-office, and said he would take a quitclaim deed on Helm's portion of the property, and let them have $1,000, part of which he would pay next morning; that "he requested me to explain the matter to my wife; he said for me to have no fears, for the amount would all come back to us children, and he would make it satisfactory with the other children;" that John J. Helm "said he took the deed to have a little jurisdiction over us and the amount he advanced us, as we were both young, and that the deed should never be recorded;" that he talked with his wife, and told her to do what she thought best, and she said she was satisfied her father would "stick to what he says;" that the next morning he told Mr. Helm his wife "was willing to get or borrow the money;" that neither he nor his wife knew the amount or value the deed called for; that he never offered to sell his wife's land to her father, nor asked him to furnish money to go into business with; that when the deed was made Mr. Helm said: "I merely advanced this much money on the place; * * * eventually this will all come back to her; I will see that it is made up to the other heirs;" that his wife's father never stated that he expected the $1,000 to be paid back to him, and never asked for it.

Annie V. Helm, widow of John J. Helm, and step-mother of appellee, swears that her husband told her, before Mrs. Boyd made the deed to him, that he wanted to get the deed to keep them from disposing of the land to Mr. Gray (the brother of Helm's first wife;) that after her husband received the deed, he said he intended to give it back to appellee, and merely wanted to get it in such a way that she could not dispose of it; that he never had the deed recorded on that account; that appellant wrote to his father, advising the latter to get a deed from Helen to prevent the land going into Gray's hands, and that such letter was sent to Mrs. Malcom Eastwood, (appellant's sister,) to prevent it from falling into the wrong hands; that on the evening before she and her husband conveyed the premises to appellant, her husband said to her: "He [appellant] wants me to make that property over to him, and I don't want to do it;" that she (witness) did not want to sign the deed to James, and reminded her husband of his promise to give the land back to Helen, and he said that "Jimmie would make it all right with her."

Jane Kelton swears: "A short time before John J. Helm made the deed to James M. Helm for said lands I heard said John J. say Jimmie would hold the property for Ella the same as he had, and Mrs. Helm objected to doing it."

George W. Cline, the attorney who drew the deed made by appellee to her father, swears that before the deed was executed John J. Helm told him that he wanted the deed so that he could control the property, and keep Boyd from disposing of it "if he got to drinking;" and that he was afraid Gray might get hold of it; that Helm also told him that the property would go to Ella at his death, and that "he did not want it to get mixed up with his other property."

The testimony of Catharine A. Wintermute confirms the evidence of appellee and Annie V. Helm in several particulars.

There is considerable amount of testimony in the record as to the value of the land. After a careful examination of it, we are satisfied that appellee's one-seventh interest in the property, notwithstanding the fact that it was an undivided interest, and subject to her father's life-estate, was worth very much more than $1,000 when she made the deed to her father, and when the latter made his deed to appellant.

Appellant testified as follows: "About the first of 1885 said John J. Helm told me he had bought Mrs. Boyd's share of her mother's estate; that he had advised her not to sell it, and told her that at his death the property would be worth more than she could then realize on it on account of his life-estate; that she insisted on his buying it, and said if he did not she would sell to some one else; that he bought the property to keep it from falling into other hands, and paid her $1,000 for it, and that he had to borrow money to pay for it. He proposed that I buy it from him at the same price to prevent Mrs. Helm No. 2 and her children getting a foothold in my estate."

Mary W. Helm, a sister of appellant and appellee, testified on behalf of appellant as follows: "I heard a conversation between father and complainant, in which he advised her not to sell her interest in said lands. He told her

it would be worth more at his death than she could get for it then. She wanted $1,200, and he told her he could not give more than $1,000; that he did not think anyone would give more than that when they could not get possession until he died. She said she would rather have the money then, to buy a homestead. They were on the front porch, and I was in the hall. I think this was in July, 1881. I also heard pa tell Mr. Boyd that he thought Ella was very foolish to sell her land."

John J. Helm, Jr., and J. R. Eastwood testified as to declarations of John J. Helm, to the effect that he purchased the property; but, as these declarations were made in his own favor, and in the absence of appellee, they were clearly incompetent.

The circuit judge found that the deed from appellee to her father was a mere security, and we are unable to say that the evidence does not sustain his finding. The relation in which John J. Helm stood to his daughter naturally gave him great influence over her. The price which he is claimed by appellant to have paid her for her property was greatly below its real value. Her statement that he promised not to record the deed is confirmed by the fact that such deed, although executed on January 10, 1882, was not, as matter of fact, recorded in White county until June 9, 1884, nor in Wabash county until January 21, 1885. It is true that she did not agree to pay back the $1,000 at a definite time. Her father would appear to have held out to her the idea that she would get enough from his estate to pay back the $1,000, or that there would be enough coming to her from his estate to cancel the indebtedness of $1,000. Still, the impression made by the evidence is that, if he did not actually practice a fraud upon her, he induced her to deed to him her property under the belief that in some way it was to come back to her, and that she was not to be troubled about repaying the amount advanced to her. We said in Workman v. Greening, supra: "If it shall appear, no matter what the form of the transaction, that the conveyance is in fact but an indemnity or security, it will be held a mortgage; and the character of liability against which indemnity is intended, or the kind or dignity of indebtedness intended to be secured, is important."

The next question is whether appellant had notice of appellee's rights when he received the deed from his father of his sister's one-seventh interest. There is testimony that he had actual notice of such rights. Mrs. Helm, who is a disinterested witness, swears that when she and her husband were having a conversation about her signing the deed to appellant, and while she was reminding him of his promise to give the land back to appellee, and was refusing to sign the deed he wanted her to sign, the appellant was in the adjoining room or hall, and called out to his father "Make her sign it,"—showing that he heard the conversation.

The decree directs that there shall be returned to appellant the $1,000 which he paid to his father, with interest thereon, subject only to the deduction of rents received by him from the property. We think the decision of the court below does justice between the parties. The decree of the circuit court is affirmed.

NELIGH v. MICHENOR et al.

(11 N. J. Eq. 539.)

Court of Chancery of New Jersey. Feb. Term, 1858.

A. Browning and T. P. Carpenter, for complainant. J. F. Randolph and P. D. Vroom, for defendants.

WILLIAMSON, Ch. In the year 1852 the complainant entered into several agreements in writing, with different individuals and with the Atlantic Land Company Association, for the purchase of several tracts of land in the county of Atlantic.

By the terms of the agreement, the several tracts were to be conveyed to him when the consideration money was paid. Under the agreements, he entered into possession. He then formed a partnership in business with John G. Michenor, one of the defendants. By the terms of the partnership they were both to be equally interested in the several tracts of land embraced in the agreements. Michenor then entered into possession with the complainant. They made valuable improvements; and, on one of the tracts, erected a hotel, at a cost of upwards of fifty thousand dollars. On the 17th October, 1854, they made a settlement between them, and dissolved partnership. It was found, upon the settlement, that the complainant had made advances, most of which had been expended in the erection of the hotel and other improvements, to an amount exceeding thirteen thousand dollars. It was agreed, in the terms of the dissolution, that the complainant should convey to Michenor all his interest in the several tracts of land mentioned in the agreements; that Michenor should pay whatever remained due of the consideration money; that he should pay all the outstanding debts of the partnership, and should execute a mortgage upon the said land to secure the complainant that judgment of $13,242.62, in five equal annual payments. The deed was executed, and delivered by the complainant to Michenor, and the latter executed and delivered the mortgage, as agreed upon. Michenor never procured any title to the land to be made to him; but with his consent, in the year 1854, conveyances were made to Charles Harlan, another of the defendants, who undertook to pay what remained due of the consideration money and some mechanic liens which were upon the hotel. It does not appear that there was any agreement in writing between the complainant and Harlan, and there is no evidence as to the particulars of the agreement upon which he received the conveyances.

The bill charges that although the deeds to Harlan are absolute on their face, it was understood that he should take the title merely to secure future advances; it alleges that the arrangement between Michenor and Harlan was fraudulent, and was made for the purpose of defeating the complainant's mortgage, and that Harlan had notice of the mortgage before he took the conveyances. The main object of the bill is to establish the mortgage as a lien upon the several tracts of land particularly described in it, and conveyed to Harlan, and the priority of the mortgage.

Harlan and Michenor have put in their answers to the bill separately. They both deny that Harlan took the conveyances to secure future advances, but allege that the title is absolute in him, and without any implied reservation in favor of Michenor. Michenor denies that he gave any notice to Harlan of the complainant's mortgage, and the latter denies that, at the time of the conveyances to him, or at the time he paid the consideration money, he had any knowledge whatever of the mortgage. And he denies the validity of the mortgage as a lien upon the property, even admitting he had notice.

Was this mortgage a valid mortgage? and did Harlan have notice of it? If these questions are answered in the affirmative, the complainant is entitled to relief, leaving only one other question to be decided—whether the mortgage is entitled to priority over the advances made by Harlan.

The validity of this mortgage is denied, upon the ground that Michenor, the mortgagor, had not any such title to, or interest in, the land as was capable of being mortgaged. The complainant was the purchaser under agreements with the vendor under hand and seal, that they would convey to him the land, at a future day, upon his paying the consideration money expressed in the agreements. Has the purchaser, under such an agreement, an interest in the land which is the subject of mortgage? For if the complainant had an interest capable of being mortgaged, Michenor had also, for all the interest which the complainant had, he assigned and conveyed to Michenor.

In 2 Story, Eq. Jur. § 1021, it is said: "As to kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage. This is in conformity to the doctrine of the civil law—Quod emptionem, venditionem que recipit, etiam pignorationem recipere potest. Therefore rights in remainder and reversion, possibilities coupled with an interest, rents, franchises, and choses in action, are capable of being mortgages."

Everything which is the subject of a contract, or which may be assigned, is capable of being mortgaged. The right or interest which the complainant had in the lands was created by contract; and it was the valuable right of having a legal conveyance of the land, upon his complying with the terms of the contract. He had acquired an interest in the land, which could not be affected, or conveyed away by the vendor, without a fraud upon the vendor's rights. And a purchaser, who should have received a conveyance with knowledge of the existing agreement, would have been held, in equity, as the vendor himself was in fact, a mere trustee for the complainant. Equity considers the vendor as a trustee for the vendee of the real estate, and the vendee as a trustee for the vendor of the purchase money. The vendee is

so far treated as the owner of the land that it is devisable and descendible as his real estate, and the money is treated as the personal estate of the vendor, and goes to his personal representatives at his death. 2 Story, Eq. Jur. § 112. There cannot be a doubt that such an interest as the complainant had under his contracts for purchase, and which he assigned to Michenor, is capable of being mortgaged. It is the subject of an equitable lien or trust, which a court of equity will enforce and protect. Interests in property are protected by courts of equity which are not recognized at law as valid or effectual as subject matters of legal conveyances or assignments. 1 Pow. Mortg. 17, in enumerating the things which are capable of being mortgaged, says: "Everything which may be considered as property, whether, in the technical language of the law, denominated real or personal property, may be the subject of a mortgage. Advowsons, rectories and tithes may be the subject of a mortgage. Reversions and remainders, being capable of grant from man to man, are mortgagable. Possibilities, also, being assignable, are mortgagable, a mortgage of them being only a conditional assignment." A tenant at will has not such an estate or property in lands as can be mortgaged, but any estate in fee simple, fee tail, for life or years, in any lands, or in any rent or profit out of the same, may be mortgaged. 1 Pow. Mortg. 18.

The case of Parkist v. Alexander, 1 Johns. Ch. 394, was, in its leading features, very similar to the present case, and its decision necessarily involved the question we are now considering. Tucker made a parol agreement with Alexander, who acted as agent for Ellis, the owner of the property, for a lease to Tucker, in fee, for a lot of land, subject to the annual rent of three pounds. Parkist, the complainant in the suit, purchased Tucker's right, and took possession of the premises, and made valuable improvements. He then sold the premises to McKnight, and gave him a quit-claim deed; and, to secure the payment of the purchase money, took his bond and mortgage, which was duly recorded. Alexander procured the lease from Ellis, the owner of the premises, and then McKnight conveyed to Alexander for $700. The answer denied that Alexander had any notice of the mortgage. The chancellor sustained the mortgage, and decided that the registry of it was notice to a subsequent bona fide purchaser. It will be observed, that when McKnight mortgaged the premises, he had no other interest in them than the assignment of Parkist's right, under a verbal agreement for a lease between Tucker and the agent of Ellis, the owner, and the right to which lease Parkist had purchased of Tucker. The interest which the mortgagee had in the land was an interest similar to that which Michenor had when he mortgaged to the complainant. McKnight had a right for a lease in fee, subject to the payment of an annual rent. If an interest like that was capable of being mortgaged, then surely Michenor, who had a right to a conveyance in fee, had such an interest as would support a mortgage. The mere fact of all the consideration money not having been paid, cannot affect the question, whether his interest was such as could be mortgaged. I think that Michenor had an interest capable of being mortgaged, and that it created a valid lien upon the land subject to the rights of the vendor under the agreement.

Did Harlan have notice of the mortgage? The mortgage was duly recorded. It is insisted that the registry was notice. It does appear to me, notwithstanding the decision of Parkist v. Alexander, that the registry of such a mortgage ought not to be considered as notice. If it is notice, it is notice to all the world. Now if Leeds, one of the persons with whom the complainant made an agreement to purchase, had sold the premises to a bona fide purchaser without actual notice of this mortgage, would such purchaser have been affected by the registry of such equitable mortgage? The agreement was not recorded. There was no authority to record it. A bona fide purchaser would not be affected by such agreement. If not, could he be affected by the registry of a mortgage executed by the vendee of such agreement? The object of the registry is to give notice to subsequent purchasers. But the registry of a mortgage like this is no protection. The title upon the record was in Leeds, and finding the title in him, a person who went to the record to search for encumbrances upon the premises would have no intimation that it was necessary to search in the name of Michenor. There was nothing upon the record to show that he had any interest in the land, or to give him any clue whatever to this mortgage; and if he was required to search for such a mortgage, then he would be obliged to search them through every name to be found in the registry books.

But I do not deem it necessary to decide this point. I think it is proved, beyond all dispute, that Harlan had actual notice of this mortgage. In his petition to open the decree pro confesso, which was obtained against him in this cause, and which is under oath, he says that on or about the 25th of May, 1855, he took a deed from Charles Leeds and wife for the land embraced in their agreement with the complainant; that, on the 19th day of May, 1855, Hackett and wife executed a deed to him for the land embraced in their agreement with the complainant, which was delivered on or about the 25th of May, 1855, and that the Camden and Atlantic Land Company executed a deed to him on the 27th of April, 1855, for the land mentioned in their agreement with the complainant, but which was not delivered until the first of the month of June, 1855. In his answer, he states that before he had any knowledge or notice whatever of the complainant's mortgage, he had not only made the agreement with Michenor, and paid the money for the property, but that he had obtained the title deeds for the property before such knowledge.

He further states that some person, some time in the spring of 1855, brought to him a mortgage purporting to be given by Michenor

to the complainant, and said to cover the property, or some part thereof, purchased by him, but whether it did so cover it or not, he cannot positively say, but that prior to that time his agreement with Michenor had been made and consummated, the money paid, and the deeds all been executed, and that the deeds from Hackett and wife and Leeds and wife had been actually delivered, and that he thinks and believes that the deed from the Camden and Atlantic Land Company had also been delivered. In his petition he states that the first information or knowledge he ever had that there was any such mortgage or agreement between the complainant and Michenor was some time after the deeds had been executed and delivered, and the purchase money, in full, paid, and that such information was given to him by Judge Carpenter, the counsel of Michenor, which was some time after the deed from the land company had been made, and was on the day, and at the time, the purchase money was paid, and the deed of the company delivered.

It is possible, with some difficulty, to reconcile the discrepancies between the petition and the answer with a disposition to tell the truth; but the evidence so completely disproves the statements of both, as to render such an attempt altogether unnecessary and unavailing.

James H. Castle says that in May, 1855, between the 10th and 15th, the complainant placed the mortgage in his hands to sell for him, and requested him to make application to Harlan; that on or about the 20th of May, he laid the mortgage before Harlan; that he spent some time with him about the matter; that Harlan examined the papers carefully, and took a memorandum of the property, and the dates of the mortgage, &c.; that he examined the map, and when they separated said he would see witness again upon the subject; that on the next day he called and asked to look at the papers, which were shown him, when he remarked that the mortgage was not worth the paper on which it was written. Witness says, in consequence of Harlan's remark, he went to the complainant, and told him he had better take legal counsel, and recommended Judge Carpenter. Judge Carpenter testifies, refreshing his memory from an entry in his docket, that the complainant retained him on the 25th of May, and then placed the mortgage in his hands. There was no one of the deeds delivered, and no money paid before the 25th of May. Harlan so states in his answer and his petition. So that it is proved that before he received a deed, or paid any money, he had full notice of the mortgage.

Isaac Loyd testifies that he was the secretary and treasurer of the Camden and Atlantic Land Company; that the deed from that company to Harlan was delivered by the witness to Harlan on the 8th of June, 1855, and at that time he received from him the purchase money. The witness further testifies that Judge Carpenter requested him to give notice to Harlan of the mortgage before its delivery; that he gave him the notice, and that Harlan made no reply, but smiled as though he knew all about it, and as if it was of no consequence.

The evidence establishes the fact that Harlan had actual notice of the complainant's mortgage before his purchase.

It appears that, at the time of Harlan's purchase, there was due and payable to the grantors, for purchase money upon their several agreements the sum of five thousand two hundred and eighty-one dollars, and that this amount was paid by Harlan. He also made other advances to satisfy encumbrances upon the property. Under ordinary circumstances, these payments would have been decreed existing liens upon the property in the hands of Harlan, having priority over the complainant's mortgage. Although Michenor, in his agreement with the complainant, was bound to pay the purchase money, it appears he was unable to do so. It was necessary the money should be paid, or the title of the vendee under the agreement would have been forfeited. The payment of this money, therefore, was necessary in order to complete the title which supports the mortgage. If a third person, under such circumstances, had advanced the money in order to prevent a forfeiture of the vendee's rights under the agreement, I think it would have been equitable that he should be reimbursed. But Harlan claims no such equity. He does not pretend that he paid the money for the purpose of protecting the mortgage. On the contrary, he is detected in an attempt to deprive the complainant of his security. His object was to defeat the mortgage; and having been thwarted in this unlawful purpose, he has no claim whatever to the interference of this court for his protection. He must stand upon his legal rights.

There was an objection made, that at the time of filing the bill there was no default of payment of anything due upon the mortgage. If such were the fact, the complainant had a right, under the circumstances, to file his bill to protect his lien. That being established, he has now a right to have it enforced for whatever may be due upon it at the time of the decree.

There must be a reference to a master to take an account of what is due upon the mortgage and upon the other encumbrances, which appear, by the pleadings, to be undisputed. In taking the account, Michenor will have an opportunity of showing what credit he is entitled to upon the mortgage, and for that purpose the master can use the depositions already taken, and may take such other testimony as the parties may see proper to offer.

RUSSELL'S APPEAL.

(15 Pa. St. 319.)

Supreme Court of Pennsylvania. 1850.

Appeal from court of common pleas, Wayne county.

Crane & Dimmick, for appellant Russell. Mr. Mallery, for appellee. Mr. Miner, for McGowan. Mr. Waller, for Graves and others.

COULTER, J. Roberts, the defendant, as whose estate the land was sold, purchased it by articles of agreement, dated 11th April, 1846, for $800, of which he paid $463, went into possession, and remained in possession until the sale and distribution of the money below. Roberts became embarrassed with debts, and on the 5th July, 1848, he executed to Stone & Graves and Graves & Moore an assignment of the contract with Dunn under which he held the land, and all his right and title thereby acquired, as collateral security for the amount due them.

This assignment was never recorded, and Roberts still remained in possession. On the 19th August, 1848, after the unrecorded assignment, Russell obtained his judgment, and on the 9th September following, McGowan obtained his judgment. These two judgments claim the money produced by the sale, according to their priority. But on the 1st December, 1848, Roberts, by parol, surrendered the land to Graves, one of the assignees; and on the same day, Dunn and wife conveyed to C. C. Graves, consideration mentioned in deed, $900. On the 4th December, 1848, Graves and wife conveyed to H. D. Roberts, the defendant, who gave a judgment note to Graves for $800, which was immediately entered up.

To this last judgment the court below awarded the whole money made by the sale on Russell's judgment. It was contended by Russell and McGowan that they were entitled to the whole fund, because the note given by Russell falsely and fraudulently recited that it was for the purchase-money. But it is well enough to deliver the case at once from this argument, because these judgments could only bind the equity, if they bound anything, which was in Roberts at the time they were obtained, that is, after the assignment to Graves & Moore. The stream cannot rise above the fountain. And the balance of purchase-money then due was a previous, valid, subsisting lien. The shuffling between Dunn, Roberts, and Graves cannot give to Russell and McGowan more than they were entitled to, nor deprive Dunn or his representative of that to which he had a lawful claim.

The real question then is, whether the judgments of Russell and McGowan bound the equity which Roberts had in the land at the time of the assignment to Graves & Moore? And that will depend upon the effect of that assignment. It was not an absolute sale or transfer of the equity, because it is expressed on its face to be a collateral security for the payment of a debt. It was, therefore, at most, nothing more than a mortgage. Even although a conveyance be absolute in its terms, if it is intended by the parties to be a mere security for the payment of a debt, it is a mortgage. Keene v. Gilmore, 6 Watts, 409; Clark v. Henry, 2 Cow. 324; Henry v. Davis, 7 Johns. Ch. 40. Roberts still continued the debtor of Graves & Moore. The debt was not extinguished; it was, therefore, a mortgage. Nor has the writing the distinctive marks of a conditional sale, for the same reason, to wit, that the original debt was by the face of the papers till subsisting. But it was never recorded, and, therefore, must be postponed to a subsequent judgment. Jaques v. Weeks, 7 Watts, 261; 17 Serg. & R. 70; St. March 28, 1820; Dunl. Laws Pa. (2d Ed.) p. 354. It is contended, however, that the contract for the conveyance of the land to Roberts was but a chose in action, and that the assignment passed the title, without the necessity of recording; that it is not within the recording acts; and Craft v. Webster, 4 Rawle, 241, and Mott v. Clark, 9 Pa. St. 399, were cited. But these cases do not carry the defendant in error through. An article of agreement for the sale of land, accompanied by delivery of possession and payment of part of the purchase-money, is much more than a chose in action; it is an abiding interest in the land itself. It may be bound by judgment; is the subject of judicial sale, not as a chattel, but as an interest in the land. In the early history of Pennsylvania, improvement rights were considered as chattels. But that time has long passed, and pre-emption or inchoate interests are bound by judgments and sold, because every interest arising out of real estate, equitable as well as legal, is considered as an interest in the land. Thousands of acres are held in this commonwealth by location and survey only. It would sound strangely to a lawyer of the interior to say that these interests were not real estate, and the transfer or incumbrance of them not subject to the recording laws. Such a doctrine would upset estates and change the accepted principles of the commonwealth. They have from ancient time been dealt with by the people as interest in real estate, like other equitable interests in land; and, being the subject of contract and sale as such, there is the same reason for their being subject to the recording acts as the legal title. The experienced and learned counsel states that he has been unable to find any reported case in which such equities were adjudged to be the subject of the recording acts. But it may never before have been drawn in question. I know very well, and I think every practitioner is acquainted with the fact, that mortgages are often given upon equitable estates, and that equitable estates are often the subject of bargain and sale; and I may say, that I don't recollect to have seen it contended in any case that the recording acts applied only to strictly legal titles, or that judgments were liens or attached only upon legal estates. The subsequent judgments, therefore, became liens at the time of their entry upon the equitable interest of Roberts, the assignment to Graves & Moore being merely a

mortgage or security for a debt, and therefore, not being recorded, must give way to the subsequent judgments.

The decree is therefore reversed, and it is modified, so as to award to the legal title, or those representing it, so much of the money or fund in court as was due for balance of purchase-money by Roberts at the time Russell obtained his judgment; and the residue is awarded to Russell's judgment, unless the residue will more than satisfy it; and, in such case, what remains is awarded to McGowan's judgment.

The record is remitted to the court below for the purpose of carrying out this modified decree.

GEORGE v. KENT et al.

(7 Allen, 16.)

Supreme Judicial Court of Massachusetts. Worcester, Oct. Term, 1863.

Bill in equity to redeem land from a mortgage.

It appeared at the hearing that on the 7th of May, 1850, Nathaniel Chessman, being the owner of a parcel of land on the south side of Water street in Milford, containing about three acres, mortgaged it to Maxcy Cook; that afterwards, on the 1st of July, 1853, he conveyed a small lot on the easterly part thereof to Hugh Galliher by a deed of warranty which was duly recorded; that afterwards, on the 5th of June, 1854, he conveyed a small lot on the westerly part thereof to Patrick Murphy, by a deed of warranty which was not recorded; and that afterwards, on the 2d of November, 1854, he conveyed another small lot lying between the lots conveyed to Galliher and Murphy, to the plaintiff, by a deed of mortgage which was duly recorded, containing the following description of the mortgaged premises: "Beginning at the northeasterly corner of the premises, on Water street, on land of Hugh Galliher; thence S. 2° W. by land of said Galliher eight rods; thence S. 87¼° W. five and one-half rods to land of Patrick Murphy, bounding southerly on land of N. Chessman; thence N. 2° E. eight rods to said street, bounding westerly on land of said Murphy; thence easterly by said street five and one-half rods to the place of beginning." The mortgage to Maxcy Cook was assigned to the defendants in February, 1861; and in May, 1861, they commenced an action against the plaintiff to foreclose it, describing in their writ the lot conveyed to the plaintiff, and no more, and obtained a conditional judgment in February, 1862, for the sum of $1,679.15. In April, 1861, the lot conveyed to Murphy became vested in the defendant Kent by mesne conveyances.

The plaintiff contended that the Murphy lot should be held to contribute, in proportion to its value, towards the redemption of the Cook mortgage; and the case was reserved by Chapman, J., for the determination of the whole court.

P. C. Bacon (P. E. Aldrich, with him), for plaintiff. G. F. Hoar, for defendants.

CHAPMAN, J. It is not denied that the plaintiff has a right to redeem on payment of the amount for which conditional judgment was rendered; but he claims the right on payment of a less sum. He insists that as his deed was a deed of warranty, and was made and recorded, while the deed to Murphy was unrecorded, he has a right to hold the Murphy lot liable to contribute to the payment of the Cook mortgage. This position would be correct if there were no other facts to affect it. But the defendants reply that he had notice of the deed to Murphy. The fact relied on to prove such notice is, that Murphy's lot adjoins him on the west, and in his deed he is bounded westerly on land of Patrick Murphy. The court are of opinion that this was sufficient notice of Murphy's title. Before the enactment of Rev. St. c. 59, § 28, actual notice of an unrecorded deed was not necessary; and circumstantial evidence of title was held to be sufficient. But the Revised Statutes made a change in this respect, and required that there should be actual notice. Curtis v. Mundy, 3 Metc. (Mass.) 405; Pomroy v. Stevens, 11 Metc. (Mass.) 244; Mara v. Pierce, 9 Gray, 306; Parker v. Osgood, 3 Allen, 487. The case of Curtis v. Mundy is, to some extent, overruled by the later cases; yet none of them hold it to be necessary that the notice shall be by actual exhibition of the deed. Intelligible information of a fact, either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary. In this case no particular form is necessary. The description of the land in the plaintiff's deed was equivalent to an affirmation of his grantor that the land lying west of it was owned by Patrick Murphy, by virtue of some proper instrument of conveyance. He knew from this information that Murphy's title was prior to his own. Having such a title, and the plaintiff having notice of it, Murphy and his grantees are not liable to contribute towards the redemption of the Cook mortgage. Chase v. Woodbury, 6 Cush. 143; Bradley v. George, 2 Allen, 392.

The plaintiff is entitled to redeem on payment of the amount of the conditional judgment against him, with interest, deducting rents and profits received.

GASKELL v. VIQUESNEY et al.

(23 N. E. 791, 122 Ind. 244.)

Supreme Court of Indiana. Feb. 21, 1890.

Appeal from circuit court, Hendricks county, A. C. AYRES, Judge.

L. A. Barnett, for appellant. *Geo. C. Harvey* and *L. M. Campbell*, for appellees.

COFFEY, J. On the 30th day of August, 1876, Jules A. Viquesney and wife executed to George W. Robinson a mortgage on real estate in Danville, Hendricks county, Ind., to secure the payment of a promissory note for the sum of $1,446.76, which mortgage was duly recorded. Prior to said date the said Jules A. Viquesney had executed two other mortgages upon the same real estate, one to Enion Singer, and another to Tracy and Bingham, the last-named being the senior mortgage on said real estate. The mortgage executed to Singer was foreclosed in the Hendricks circuit court, and the property therein described bid in by John M. Shirley and William N. Crabb for the sum of $973.93; and on the 28th day of May, 1878, they received a sheriff's deed therefor. George W. Robinson was not made a party to the suit to foreclose this mortgage. The appellant subsequently became, and now is, the owner of the note and mortgage executed to the said Robinson, and now prosecutes this suit for the purpose of being allowed to redeem from the sale on the Singer mortgage, and to charge the said Shirley and Crabb with the rents and profits of said real estate during the time they have held and been in possession of the same. Crabb has conveyed his interest in the property to Shirley. The appellee Shirley answered: (1) That he was the owner in fee of the land described in the complaint, having purchased the same of Thomas J. Cofer, assignee in bankruptcy of the said Jules A. Viquesney, on the 20th day of June, 1877, and having received a deed therefor from said Cofer as such assignee, the said Viquesney having previously been adjudged a bankrupt by the United States district court for the state of Indiana; that he also held title to said real estate under a sheriff's deed therefor executed by the sheriff of Hendricks county on the 28th day of May, 1878, which deed was executed to him on a sale of said premises by the sheriff of said county in the foreclosure proceeding set out in the complaint on the Singer mortgage, and that the mortgage executed to the said George W. Robinson, which the appellant is now seeking to foreclose, was executed without any consideration, and for the purpose of cheating, hindering, and delaying the creditors of the said Viquesney. The second paragraph avers that the mortgage in suit was given as an indemnity, and that said Robinson had never been damaged or compelled to pay the debt against which the mortgage was given to secure him. (3) In the third answer to so much of the complaint as demands and requires him to account for the rents and profits of the real estate described in the complaint, he averred that he was the owner in fee of the real estate described in the complaint by virtue of a judicial sale made of the same by order of the district court of the United States for the district of the state of Indiana, on the 20th day of June, 1877, by one Thomas Cofer, who was the assignee in bankruptcy of the said Jules A. Viquesney, the said Viquesney having prior thereto been duly adjudged a bankrupt by said court upon proper petition; that the said Cofer executed to him a deed for said real estate, which was duly confirmed by said district court; that he is also the owner of said real estate, and holds title thereto by virtue of a sheriff's deed executed to him by the sheriff of Hendricks county, Ind., on the 28th day of May, 1878, pursuant to a sale of said real estate in the foreclosure proceedings on the Singer mortgage set up in the complaint. This answer also sets up the mortgage executed by Viquesney to Tracy and Bingham; alleges the foreclosure of the same in the district court of the United States for the district of Indiana; and the payment of the sum of $1,265.74 by the appellee, in satisfaction thereof, to protect his title. The appellee Shirley also filed a cross-complaint, in which he sets up the amount paid at the sheriff's sale on the Singer mortgage, and the amount paid to discharge the Tracy and Bingham mortgage and decree, and asked to be allowed therefor in the event a decree was entered permitting the appellant to redeem. The court overruled the demurrer to this answer, and the appellant excepted. Upon issues formed, the cause was tried by the court, who entered a finding and decree that the appellant was entitled to redeem the property covered by the Robinson mortgage upon payment to the appellee Shirley of the sum of $3,992.

The appellant filed a motion for a new trial, which was overruled, and she excepted. The errors assigned are—*First*, that the court erred in overruling the appellant's demurrer to the first and second paragraphs of the answer of the appellee Shirley; *second*, that the court erred in overruling the appellant's demurrer to the third paragraph of the answer of Shirley; *third*, that the court erred in overruling the appellant's motion for a new trial.

As the appellant does not discuss the first assignment of error, the same may be regarded as waived.

The first objection urged against the third paragraph of the answer is that it attempts to answer the whole complaint, and that it can, at most, amount to an answer to so much of the complaint as seeks to require the appellee Shirley to account for rents and profits. Counsel is in error in assuming that the answer attempts to answer the whole complaint. It is addressed to so much of the complaint only, as we understand the plea, as seeks to charge the appellee with the rents and profits of the mortgaged premises during the time he occupied them. The question is therefore presented as to whether the answer contains facts sufficient to bar the appellant's claim for rents and profits of the mortgaged premises. It is believed to be the universal rule, in all cases where the mortgagee takes and retains possession of the mortgaged premises under his mortgage, that he must ac-

count for the rents and profits received by him from the premises while he holds the same under his mortgage. 2 Jones, Mortg. (4th Ed.) § 1114; Troost v. Davis, 31 Ind. 34; Hannon v. Hilliard, 83 Ind. 362; Arnold v. Cord, 16 Ind. 178; Taylor v. Conner, 7 Ind. 116.

Such rule, in the absence of some statute upon the subject, rests upon the reasonable doctrine that, while the mortgagee is the holder of the legal title to the mortgaged premises, he holds such title, nevertheless, subject to the equitable right of the mortgagor to pay the debt, and thus destroy or put at an end his legal title, and that the mortgagee is entitled to no more than his debt, which the mortgage was intended to secure. Hence it is that, when the mortgagor desires to redeem from a mortgagee who has been in the possession of the mortgaged premises under his mortgage, he has the right, in a court of equity, to call upon the mortgagee to account for the amount received by way of rents and profits, for the purpose of determining how much, if anything, is required in order to discharge the mortgage debt. This doctrine extends to cases where there has been an attempt to sell the premises under the mortgage, where such sale is defective, and does not divest the title of the mortgagor. Hannon v. Hilliard, supra. This right to compel an accounting for rents and profits extends, also, to a junior incumbrancer. He may compel a senior mortgagee, who has been in possession under his mortgage, to account to the same extent and in the same manner as the mortgagor might compel an accounting. His right to compel such an accounting does not rest upon any obligation of the senior mortgagee to him, for there is no contract between them, but it rests upon the fact that the senior mortgagee is under obligation to the mortgagor to account; and that by reason of his junior lien he has the right, in equity, to stand in the place of the mortgagor, and compel the application of the rents and profits to the satisfaction of the senior mortgage. The junior mortgagee has no right, therefore, to compel an accounting when the mortgagor has no such right; for it is through the mortgagor, and the equity existing between him and the senior mortgagee that he is enabled to compel an application of the rents and profits to the satisfaction of the senior mortgage. For these reasons it is well settled that, in order to charge a mortgagee with rents and profits, it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with the rents and profits of the mortgaged premises. 2 Jones, Mortg. (4th Ed.) §§ 1114–1120; Daniel v. Coker, 70 Ala. 260; Hart v. Chase, 46 Conn. 207; Van Duyne v. Shann, 41 N. J. Eq. 312, 7 Atl. Rep. 429; Catterlin v. Armstrong, 79 Ind. 514, 101 Ind. 258; Johnson v. Hosford, 110 Ind. 579, 10 N. E. Rep. 407, and 12 N. E. Rep. 522; Renard v. Brown, 7 Neb. 449.

In the case of Catterlin v. Armstrong, 79 Ind., supra, it was said by this court that "a purchaser at a foreclosure sale, defective because a junior mortgagee was not made a party, upon a subsequent redemption by the latter, must account for the rents and profits, if such sale operates merely as an assignment of the first mortgage. But if the sale operates not only as an assignment of a prior mortgage, but as a foreclosure of the equity of redemption, subject to the junior mortgage, the purchaser, standing in the place of the mortgagor or owner of the premises, is not liable to account for the rents or profits." It follows from what we have said, and from the authorities above cited, that the third paragraph of the answer of the appellee Shirley was sufficient to bar the appellant's complaint, in so far as it sought to compel the former to account for the rents and profits of the mortgaged premises. It discloses the fact that the title of the mortgagor, Viquesney, had been divested, and vested in the appellee Shirley. As Shirley held in the capacity of owner of the premises, and not as mortgagee, he was not liable to account for rents and profits. The case of Murdock v. Ford, 17 Ind. 52, is in seeming conflict with the later case of Catterlin v. Armstrong, supra. In so far as it seems to hold that a purchaser at a foreclosure sale which divests the title of the mortgagor is liable for rents and profits to a junior mortgagee, the same is disapproved. The court did not err in refusing to permit the appellant to prove the value of the rents and profits of the mortgaged premises, as it was admitted on the trial that the title of the mortgagor had been extinguished before the appellee Shirley took possession. The assignment in bankruptcy divested his title, and vested it in the assignee, who by his deed vested it in Shirley. Nor do we think the court erred in admitting in evidence the deed executed by the assignee in bankruptcy to Shirley. It tended to support the allegations in the appellee's answer, and to prove that Shirley was in possession as owner, and not as mortgagee.

It is earnestly insisted, however, that the circuit court erred in fixing the amount to be paid by the appellant in order to redeem. It is insisted that, in ascertaining the amount to be paid, the court not only allowed the amount due on the Singer mortgage and the Tracy and Bingham mortgage, but that it allowed also the costs made in the foreclosure of both said mortgages. It seems to be too well settled to admit of controversy that, where a junior mortgagee desires to redeem from a sale on a senior mortgage, he may do so, where he was not made a party to the foreclosure suit, without paying the costs of such suit. Where he is not made a party, the foreclosure is, as to him, a mere nullity. He is only required to pay the mortgage debt, with interest. McKernan v. Neff, 43 Ind. 503; Hasselman v. McKernan, 50 Ind. 441; Hosford v. Johnson, 74 Ind. 479; Shirk v. Andrews, 92 Ind. 510; Curtis v. Gooding, 99 Ind. 46; Daugherty v. Deardorf, 107 Ind. 527, 8 N. E. Rep. 296; Nesbit v. Hanway, 87 Ind. 400.

There is no allegation in the complaint in this case as to the amount due on the Singer mortgage, nor is there any allegation as to the amount due on the mortgage executed to Tracy and Bingham. It is

somewhat difficult to ascertain from the evidence in the record the exact amount due on these senior liens. As the appellant desired to redeem by the payment of a sum less than the face of these claims, it was her duty to exhibit to the court trying the cause the exact state of the accounts. However, it is sufficient to say in this case that it does not appear on the face of the record before us that the costs of foreclosing these senior liens is included in the amount which the court adjudged against the appellant as the amount necessary to be paid for the redemption of the mortgaged premises. As these senior liens drew interest at the rate of 10 per cent. per annum, it was proper to count interest at that rate to the date of the trial. We find no error in the record.

Judgment affirmed.

WITHAM v. BROONER.

(63 Ill. 344.)

Supreme Court of Illinois. Jan. Term, 1872.

Appeal from circuit court, Mason county; Charles Turner, Judge.

Dearborn & Campbell, for appellant. Lacey & Wallace, for appellee.

THORNTON, J. The refusal to admit in evidence the deed to Hallowbush is the only error assigned.

The deed was executed to Hallowbush "in trust for White and Smith." The trustee had no trusts to execute—no duties to perform. He was a mere naked trustee.

One of the cestuis que trust had executed a deed to the same land to the plaintiff below, under which he claimed title.

In whom was the legal estate, by operation of the deed to Hallowbush—the trustee or the cestuis que trust?

Our statute is a substantial re-enactment of the twenty-seventh statute of Henry VIII., usually termed the "Statute of Uses." Leaving out some of the verbiage, it enacts that when any person shall be seized of any lands, to the use, confidence or trust of any other person, by any bargain, sale, agreement or otherwise, in such case all persons that have such use or trust in fee simple shall be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same land, to all intents, in law, as they shall have in the use or trust of and in the same. Rev. St. 1845, p. 103, § 3.

The clear and positive language of the statute, aided by the first section of the same act, unmistakably determines the question. The person having the use shall be adjudged to be in lawful seizin, estate and possession. No language could more aptly stamp the character of the title.

Livery of seizin is abolished by the first section of the conveyance act, and the title is thereby absolutely vested in the donee, grantee, bargainee, etc., independently of the statute of uses. Hence, under this statute, a deed in the form of a bargain and sale must be regarded as having the force and effect of a feoffment; and under the statute of uses, a feoffment to A., for the use of or in trust for B., would pass the legal title to B. In a deed purely of bargain and sale, independently of the first section of the conveyance act, the rule would be different, and the title would vest in the bargainee. Without the first section, the legal title would be in the trustee, in this case; but as the trust was a passive one, the deed operated as a feoffment would at common law, and vested the legal title in the cestuis que trust, by virtue of the statute of uses. Thus the statute executes itself. It conveys the possession to the use, and transfers the use to the possession; and by force of the statute the cestuis que trust had the lawful seizin, estate and possession.

The three things necessary to bring this estate within the operation of the statute did concur. There was a person seized to a use; a cestui que use; and a use in esse. The use was then executed, and the statute operated. There was nothing in the deed to prevent the execution of the use. There was nothing to be done by the trustee to make it necessary that he should have the legal estate. There was to be no payment of rents and profits to another, or debts, or taxes. The statute operated instantly and vested the legal estate in the cestuis que trustent.

All the authorities sustain this view.

Blackstone says that previous to the enactment of twenty-seventh Henry VIII. abundance of statutes had been provided which tended to consider the cestui que use as the real owner, and that this idea was carried into full effect by the twenty-seventh Henry VIII., called, in conveyances and pleadings, the "Statute for Transferring Uses into Possession"; that the statute annihilated the intervening estate of the feoffee, and changed the interest of the cestui que use into a legal instead of an equitable ownership; and that the legal estate never vests in the feoffee for a moment, but is instantaneously transferred to the cestui que use, as soon as the use is declared. Bl. Comm. bk. 2, pp. 332, 333.

Cruise, in his Digest of the Law of Real Property (1 Greenl. Ed., top page 313, § 34), says when the three circumstances concur, necessary to the execution of a use, "the possession and legal estate of the lands out of which the use was created are immediately taken from the feoffee to uses, and transferred, by the mere force of the statute, to the cestui que use. And the seizin and possession thus transferred is not a seizin and possession in law only, but are actual seizin and possession in fact—not a mere title to enter upon the land, but an actual estate." See, also, Smith, Real & Pers. Prop. 155; 1 Land Uses, 119; 2 Washb. Real Prop. (1st Ed.) 120; 4 Kent, Comm. 288 et seq.; Webster v. Cooper, 14 How. 488; Barker v. Keat, 2 Mod. 250.

We are of opinion that the legal estate was in the cestui que trust, and that the rejected deed was admissible.

The cases referred to in this court are not in conflict with our conclusion.

The judgment is reversed and the cause remanded.

Judgment reversed.

JACKSON ex dem. WHITE v. CARY.

(16 Johns. 302.)

Supreme Court of New York. May, 1819.

This was an action of ejectment brought to recover an undivided eighth part of about six thousand acres of land in the county of Otsego. The cause was tried before Mr. J. Platt, at the Otsego circuit, in June, 1818.

The premises in question were part of a patent granted to George Groghan, and ninety-nine others, for 100,000 acres of land. The other proprietors released to Croghan, who, by deed dated March 2, 1770, conveyed the premises to Augustine Prevost; and Augustine Prevost and wife, by deed dated June 29, 1771, conveyed the same to Cornelius P. Low, who died about the year 1791, leaving the defendant his only child and heir at law.

The plaintiff founded his claim upon a deed dated the 20th of October, 1790, from Helena Kip, widow, and sole devisee of Henry Kip, deceased, and Henry H. Kip, to Richard Cary the elder, and the defendant Ann, his wife. This deed was expressed to be given for the consideration of £425, and granted to the parties of the second part, (being in their possession by virtue of a bargain and sale bearing date the day before, and by force of the statute, etc.,) a tract of 6,060 acres formerly conveyed by G. Croghan to A. Prevost, and lately conveyed by the sheriff of Montgomery to Henry Kip, deceased, and Henry H. Kip, to have and to hold the same unto the said parties of the second part, their heirs and assigns, to the only proper use and behoof of the said parties of the second part, their heirs and assigns: "In trust, nevertheless, to and for the only proper use of the heirs of him, the said Richard Cary, party hereto, on the body of her the said Ann, the wife of the said Richard Cary, for ever, whether the same are already begotten or to be begotten; provided always, and this trust is upon this condition, nevertheless, that it shall and may be lawful to and for the said Richard Cary and Ann Cary to grant, bargain, sell, alien, release, and convey unto Edward Hurtin, of Stonington, in Connecticut, his heirs and assigns, a farm containing 300 acres of land, &c., and also to let out in leases, renewable from time to time, or to grant, bargain, sell, alien, release, and convey in fee simple, by mortgage, or otherwise, to any person or persons, a quantity of the above released premises, not exceeding 3,000 acres of land, including the aforesaid and described farm of 300 acres of land, and out of such sale or sales to pay and retain to their own use the sum of £425 lawful money aforesaid, the consideration money above mentioned, paid by them out of their own proper money, and the interest thereof, together with all costs and charges, as may arise or happen, by reason or means of such sale or sales; and the overplus money to have and to hold in trust, to and for the use of their heirs, as before limited and expressed."

Richard Cary, the grantee, came on the premises as early as the year 1790 or 1791, and within one or two years afterwards, removed his family there, and continued to occupy the premises until his death, which happened ten or twelve years before the trial, and the defendant has ever since remained in possession. Cary the elder, the grantee in the last mentioned deed, left Richard Cary, the younger, and seven other children; and Richard Cary, the younger, by deed dated the 14th of April, 1809, conveyed to the plaintiff's lessor and one Seelye, all his right and interest, being one eighth part of the premises in question. In May, 1810, Seelye released all his interest to the lessor of the plaintiff.

A witness testified, that both before and after the deed from R. Cary, the younger, he had many conversations with the defendant in relation to the interest, and the interest of her children in the premises, and in relation to the title; that in all these conversations the defendant never pretended that she had any other interest or title than what was given by the deed from Helena and Henry H. Kip; and that, by the legal construction of that deed, she supposed that she had a life estate in the premises and nothing more. The witness stated, that the reason of his inquiring into the title to the premises was, that he had been engaged in negotiating a purchase of some of the rights of the children of R. Cary the elder, in the property; that his conversations with the defendant were had in reference to the contemplated purchase, and that in all these conversations the defendant admitted the right of the children to sell, when of age, subject to the life estate, which she claimed under the deed from the Kips.

A verdict was found for the plaintiff, subject to the opinion of the court, on a case which was submitted to the court without argument.

SPENCER, C. J. The first objection to the deed from the Kips is, that it is a deed of bargain and sale, and that upon such a deed a use cannot be limited to any other person than the bargainee. This court adopted and recognized that principle, in Jackson v. Myers, 3 Johns. 396. Sanders, in his Treatise on Uses and Trusts, gives this question a very full discussion. He says (page 315): "That the nature of the estate since the statute is the same as it was before; that the bargainee is still but a cestui que use, and though he has a legal, instead of a fiduciary estate, since the statute, yet, that legal estate is made such by force of the statute of uses, and not according to the rules of the common law. Upon this principle, it has been held, and is now established, that no use can be limited to arise out of the estate of the bargainee to a third person, for that would be to limit a use to arise upon a use. Therefore, if A. bargains and sells in fee to C., to the use of A., (the bargainor,) or to any other person, for life, or in fee, this limitation to the use is void. But though this declaration of the use is void as a use, yet it has been a question, whether it would not be supported as a trust, in chancery." And he apprehends it would be sup-

ported in that court. Shepherd, in his Touchstone (505–507), holds the same doctrine. He observes, that if one seised of land in fee, bargain and sell it, or make a lease of it, to another in trust, or for the benefit of a third person, this is but a chancery trust, in this third person, as was clearly held in 8 Car. B. R.; and he proceeds to show that a fine, feoffment, or recovery, may be had of land, to the use and intent, that either the parties thereto, or others, shall have it for any time or estate. Cruise (title 12, c. 2, §§ 11, 12, 24) confirms the positions of Shepherd and Sanders; and, indeed, there is no case to the contrary. This doctrine receives full and complete confirmation from the observations of Lord Hardwicke in Hopkins v. Hopkins, 1 Atk. 591.

The legal estate, therefore, was in Cary and wife, under the deed from the Kips; and it is the settled doctrine of this court, that we look only to the legal estate in an action of ejectment, disregarding the equitable interest. 8 Johns. 488, and the cases there cited.

Mrs. Cary having survived her husband, and the estate granted to them being neither in joint-tenancy nor tenancy in common, and so not affected by the statute, she, as survivor, takes the whole legal estate. This point was decided at the last term, in Jackson v. Stevens, 16 Johns. 110.

Independently of these considerations, the case shows that the defendant deduced a legal title to himself, as the heir of Cornelius P. Low, who, it was proved, acquired a complete title to the premises under the original patentee; and, most certainly, she was not concluded by the deed from the Kips, from asserting her title. Without stopping, therefore, to inquire whether, under any circumstances, the lessor of the plaintiff could avail himself of that deed, as an estoppel, which I am clearly of opinion he could not, the defendant never could be estopped by it, as she was a feme covert when it was given.

The evidence of declarations made by the defendant avail nothing, for although parol declarations of tenancy have been received, with certain qualifications, parol proof has never yet been admitted to destroy or take away a title. To allow parol evidence to have that effect, would be introducing a new and most dangerous species of evidence. The statute to prevent frauds and perjuries, which has been considered the Magna Charta of real property, avoids all estates created by parol, and all declarations of trust, excepting resulting trusts, regarding any lands, tenements, or hereditaments. Yet, in defiance of this statute, we are asked to devest the defendant of what appears to be a complete title to the premises, by her parol declarations. This cannot be listened to.

Judgment for the defendant.

EIPPER et al. v. BENNER.

(71 N. W. 511.)

Supreme Court of Michigan. May 25, 1897.

Error to circuit court, Calhoun county; Clement Smith, Judge.

Claim by Mary Eipper and Julius Nagel against the estate of Chris Fred Vogel, which was allowed by the probate judge, acting as commissioner, and Mary E. Benner, administratrix of said estate, appealed to the circuit court. There was a judgment disallowing the claim, and claimants bring error. Reversed.

Herbert E. Winsor, for appellants. John E. Foley, for appellee.

HOOKER, J. In a proceeding before the probate judge of Calhoun county, acting as commissioner, the claim of the claimants was allowed. Upon appeal the circuit judge reversed the case, and disallowed the claim. His finding states the facts, and is given in full:

"(1) Claimants are nephew and niece of Mary Vogel, who was the wife of Chris Fred Vogel, deceased. Julius was born in May, 1866, and his sister, Mary, is about two years younger. They are the children of a deceased brother of Mary Vogel, and were left orphans in the state of Mississippi, but at what time is not disclosed by the proof, but at a time prior to their coming into the family of Chris Fred Vogel. Mary Vogel learned of the death of her sister, and that these children were orphans, and took steps to find them, and bring them North, into her family, and did find them, and they lived in the family of herself and husband about six (6) years before her death.

"(2) Claimants have no property, and Mr. and Mrs. Vogel were at some expense in finding them and removing them to their home.

"(3) They were cared for and looked after by the Vogels as members of the family from the time they came into the family, worked out part of the time, and attended school, but not to any great extent.

"(4) At the time of the marriage of Mr. and Mrs. Vogel he was a widower with one child, who is now living, and in whose interest this claim is contested. Mrs. Vogel was a widow without children, and died childless.

"(5) At the time of the marriage, Mrs. Vogel had several hundred dollars of property in her own right, consisting of moneys out at interest, and houses and lots, in Coldwater, Michigan, where she lived. Mr. Vogel had some property, and they accumulated some by their labor, and in the management of what they had. They used their property for the joint interest of both in the care of the family, but investments were made in the name of Mr. Vogel.

"(6) Mrs. Vogel died April 21, 1887, and Gottleib Kast was appointed her administrator, and proceeded to settle up her estate. It was appraised at the sum of one thousand eight hundred and eighteen ($1,818) dollars, and consisted principally of real estate owned by her at the time of her marriage. The estate was duly closed in probate court, and distributed to her legal heirs, under an order of distribution made by Hon. Geo. Ingersoll, Judge of Probate.

"(7) The heirs at law of Mary Vogel were these claimants, children of a deceased brother, Michael Nagel, a brother, a brother in Germany, a brother in Ohio, and eight or nine children, who were the children of a deceased sister in Germany.

"(8) A day or two after her death her brother, Michael Nagel, talked with Mr. Vogel about the property of his wife and the relations pertaining to the same as between Mr. and Mrs. Vogel. It is claimed that this talk was in the interest of claimants. Claimants knew nothing of the talk, and had no part in it. Michael was not their legally appointed guardian, nor was he in any way authorized by them, or by any one, to make any arrangement regarding their interest in the estate of Mrs. Vogel, but acted entirely of his own motives.

"(9) In pursuance of this talk, and before Michael went home, the parties went to the probate court, and Judge Ingersoll, the probate judge of Calhoun county, prepared a paper, which Mr. Vogel signed, and which was in words and figures as follows:

" 'Exhibit A. Memoranda of unsettled matters between Chris Fred Vogel and the estate of Mary M. Vogel, his wife, as follows: Said Chris Fred Vogel has heretofore received from said Mary M. Vogel the following sums of money, to wit:

One sum of three hundred dollars	($ 300.00)
One sum of three hundred and fifty dollars	(350.00)
One sum of three hundred and seventy-five	(375.00)
And one sum of fourteen hundred dollars	(1,400.00)
Amounting in all to twenty-four hundred and twenty-five dollars	($2,425.00)

—And out of which he paid at the request of said Mary M. Vogel one hundred dollars for the benefit of Gottleib Grimmer, and which leaves a balance of twenty-three hundred and twenty-five dollars ($2,325.00), and which amount I agree, in pursuance of my understanding with my said wife, to bequeath by my will to Julius Nagel and Maggie Nagel, minors, now members of the family of Chris Fred Vogel. Dated, Marshall, April 27th, 1887. Chris Fred Vogel. In presence of George Ingersoll.'

"This paper was left with Judge Ingersoll, and remained with him till after the death of Mr. Vogel.

"(10) January 31, 1889, Chris Fred Vogel, on petition of Julius Nagel, and while Mr. Kast was acting as administrator of Mrs. Vogel's estate, was cited into probate court to testify as to the property he had belonging to his deceased wife's estate. This examination was

in writing before the judge of probate, and was conducted by Hon. John C. Patterson, who represented Mr. Nagel. In this examination he denied owing his wife anything. He admitted he had considerable money, and in fact the amounts set forth in the memorandum, but claimed it had been paid out in various ways at her request. He also denied to Mr. Kast, while he was the administrator of Mrs. Vogel's estate, any liability to her estate or to claimants.

"(11) In December, 1894, Mr. Vogel made a will, in which Julius and Mary, these claimants, were remembered substantially as was set forth they should be in the memorandum made by Judge Ingersoll. The contents of this will rest somewhat in memory and hearsay, and, while not in the exact terms of the memorandum, were as favorable to them as the terms of it would have been.

"(12) This will was destroyed some time after its execution, and was not in existence at the death of Mr. Vogel.

"(13) Mr. Vogel died July 13, 1895, without a will, leaving as his only heir his daughter, Elizabeth. Administration was granted to his daughter. His property was appraised at six thousand five hundred and ninety-seven dollars ($6,597.00).

"(14) Claimants file a claim against his estate which was the memorandum set forth in the ninth finding of fact herein, and to which was attached the following: 'Marshall, Mich., Nov. 13, 1895. Estate of Chris Fred Vogel, Dr., to Julius Nagel and Mary Nagel Eipper. To the above claim, $2,425.00. Interest to date if allowed.'

"Law.

"Claimants have no legal claim against the estate of Chris Fred Vogel, and cannot recover. It should be certified back to the probate court for Calhoun county that this claim is disallowed, with costs to be taxed.

"Dated August 15th, 1896.

"Clement Smith, Circuit Judge."

The only question that seems to be raised by the brief of appellants goes to the merits,—can the order be sustained upon the finding of fact? The finding conclusively shows that Chris Fred Vogel unqualifiedly admitted in a most solemn manner that he had money belonging to his wife to the amount of $2,425, and that he had an understanding with his wife, before her death, that he was to bequeath it to the claimants, who were her nephew and niece. Not only does it appear that he admitted that he made this promise, but that he made the writing in which the admission appears as a means of avoiding an accounting for this property belonging to his wife at a time when her brother, one of her heirs, required it, as a condition that the heirs should not compel such accounting; and it was shown that he made a will substantially in accordance with his admitted promise, which was destroyed some time after its execution, and before his death. The circuit judge was of the opinion that the admission of an "understanding" with his wife was not the admission of a promise, and that, if it can be said to amount to a promise, it was not based upon a consideration, because neither Mr. nor Mrs. Vogel was under any obligation to the claimants which would amount to a valid consideration. It is clear that the judge found that Vogel admitted that he had the sum claimed of his wife's property, and that he had promised her to leave it to these children at his death. We are of the opinion that the facts found show that Vogel held this money in trust for these children by arrangement with his wife, and after his death it was the duty of the administrator to pay it over to them, upon allowance by the probate court. People v. Wayne Circuit Court, 11 Mich. 404; Wheeler v. Arnold, 30 Mich. 304; Nester v. Ross' Estate, 98 Mich. 200, 57 N. W. 122; Frank v. Morley's Estate (Mich.) 64 N. W. 577. This trust, though it be said that it rested in parol, was admitted in writing, which was sufficient to satisfy the statute of frauds. Patton v. Chamberlain, 44 Mich. 5, 5 N. W. 1037. But it would seem that the statute of frauds has no application, inasmuch as the trust fund was personalty. Bostwick v. Mahaffy, 48 Mich. 342, 12 N. W. 192; Calder v. Moran, 49 Mich. 14, 12 N. W. 892; Chadwick v. Chadwick, 59 Mich. 87, 26 N. W. 288; Bowker v. Johnson, 17 Mich. 42; Penny v. Croul, 76 Mich. 471, 43 N. W. 649. The order of the circuit judge is reversed, and that of the probate court affirmed, with costs of both courts to the claimants against the estate. It will be so certified to the circuit and probate courts. The other justices concurred.

HAMILTON v. HALL'S ESTATE.

(69 N. W. 484.)

Supreme Court of Michigan. Dec. 24, 1896.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Claim by Sarah M. Hamilton against the estate of Salina J. Hall, deceased. Judgment for defendant, and claimant brings error. Affirmed.

Bowen, Douglas & Whiting, for appellant. Conely & Taylor, for appellee.

LONG, C. J. The claimant presented to the commissioners on claims in the Wayne circuit court a claim against the estate of the deceased for the sum of $1,000 and interest thereon at the rate of 7 per cent. per annum from May 13, 1890, less certain credits. This claim was disallowed by the commissioners, and an appeal was taken to the circuit court for Wayne county, where the court directed verdict in favor of the estate.

It appears that Reuben H. Hall died testate in the city of Detroit, May 13, 1890, leaving all his property to his wife, Salina J. Hall, against whose estate the claim in controversy is presented. He had no children. Before his death he told his wife to give to his sister, the claimant here, the sum of $1,000. It is contended by the claimant that, after the death of Reuben H. Hall, his widow said she would follow her husband's wishes, and give the claimant $1,000 out of the estate; that thereafter Salina J. Hall treated the $1,000 as belonging to the claimant; and that thereby a trust was created in favor of claimant, which can now be enforced against said estate. In order to determine that question, it is necessary that some of the testimony given upon the trial be set forth. Mr. Houston testified that Salina J. Hall, in her lifetime, said to him that her husband told her, before his death, to give his sister, Mrs. Hamilton, $1,000 out of his estate. Witness stated: That he had loaned money for Mrs. Hall, and collected interest on it when due. That deceased had considerable property, acquiring the greater portion of it from her husband. That at certain times she told him to pay claimant money as interest on $1,000. That she said she would pay interest on the money while she kept it, and that, at different times, she directed him to pay claimant money for her. That in August, 1890, he paid claimant, for deceased, $50; in November, 1891, $25; September, 1891, $50; June, 1892, $25; August, 1892, $20; May, 1893, $50; July 21, 1893, $25; July, 1894, $10; July, 1894, $40; and December, 1894, $25. That he made these payments out of interest on moneys that he had collected upon loans made for the deceased, and the payments were made with the knowledge of the deceased and by her instructions. The witness was asked to state whether Mrs. Hall ever said anything in regard to why she did not give the whole $1,000 to claimant immediately, and stated: "She said she wanted Mrs. Hamilton to have this money for her own benefit. She thought her husband owed on his farm, and, if she gave her the $1,000, he would turn the money in in payment of his farm." Counsel then put in evidence a letter addressed to Mrs. Hamilton from Mrs. Hall, under date of December 16, 1894, as follows: "Dear Sister: Please explain so I can send my dues first January, whatever they are. I send you check for $25, and I hope it will reach you in good season and all right. Would have sent it before, but was so busy for several days before auntie went away I didn't do anything only what I had to. Wish you would send me a statement of what you have had, so I can see if it tallies with mine." Mary Brining was called as a witness, and stated that deceased told her she was to pay Mrs. Hamilton $1,000; that she didn't have the money then, but would pay her just as soon as she could make arrangements and get it. Witness said: "I think she was paying interest, and that she said she would pay her that money just as soon as she could get around to it." Mabel Loomis also testified as follows: "She said Mr. Hall told her to give Mrs. Hamilton $1,000, and that she would give it to her as soon as she could, and would give her the interest on it until she did give it to her. She said that was Mr. Hall's wish." John W. O'Keefe testified: "Well, she said there was no particular time that she was obliged to give it to her, only she was going to give it to her just as she saw fit.—saw that she could; that Mrs. Hamilton wanted her to give it to her all at once, but she would not do that, but she wanted to give it to her in small payments along, so that Mrs. Hamilton would use it for her own personal use. * * * She said she was going to pay her interest on it." Mary K. West testified about a talk she had with Mrs. Hall, in which she stated: "He wanted her to give Mrs. Hamilton a certain sum of money. She did not say to me how much. She says: 'I am going to give Sade $1,000, but I am not going to give it to her right away, because Mr. Hall didn't want me to cramp myself; but I shall pay her interest until I get around to pay it to her.'" The witness further testified to certain goods that were bought by Mrs. Hall and sent to Mrs. Hamilton, and said that Mrs. Hall said to her: "This is to be applied on interest." The witness, speaking of another occasion, when she had a conversation with the deceased, said that Mrs. Hall told her that she had $1,000 coming to her, and she believed, when she got it, she would give Sade $500 of it for her next birthday. The witness, continuing, says: "And she says: 'What do you think about it?' I says: 'Well, if you have got to pay, I would get it off my hands, and be done with it. You are paying interest on

it now. Why not have it through with?' She says: 'I believe I will, and, when he pays me the first of May, I will give her $500 of it.' But she died before then. That was the January before she died." This is substantially all of the testimony relating to the subject of the fund.

The only question relating to this branch of the case is whether the claim can be sustained as a declaration of trust. It is claimed by defendant that there was no consideration for the alleged declaration of trust; that, if made, it was purely voluntary; and that, under the facts shown, if a trust exists, it is merely executory. It is contended upon the part of the claimant that the evidence in the case is clear and explicit that Salina J. Hall, in her lifetime, declared herself voluntarily, by parol, to be trustee for the sum of $1,000 received by her from her husband for the use and benefit of Sarah M. Hamilton, and that she treated this sum as belonging to the claimant, and paid her interest upon it as claimant's money, and that by so doing she passed the title to it to Sarah M. Hamilton, retaining in herself only the legal title and the right to control the fund as trustee during her lifetime for the use and benefit of claimant; that is, that the trust was an executed one, and is not purely executory. The distinction between executed and executory trusts is plainly pointed out in Gaylord v. City of Lafayette, 115 Ind. 423, 17 N. E. 899, where it is said: "A trust may be said to be executed when it has been perfectly and explicitly declared in a writing, duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done except that the trustee, without any further act or appointment from the settlor, carry into effect the intention of the donor as declared. In such a case, even though there was no valuable consideration upon which the trust was originally declared, a court of chancery will enforce it in favor of one whose relation to the donor was such as to show a good or meritorious consideration. Where, however, property has been conveyed upon a trust the precise nature of which is imperfectly declared, or where the donor reserves the right to define or appoint the trust estate more particularly, although it may be apparent that the creator of the trust has in a general way manifested his purpose ultimately, at a time and in a manner thereafter to be determined, either by himself or by the trustee, to bestow the property upon a person named, the trust is incomplete and executory, and not within the jurisdiction of a court of chancery; the rule being that courts of equity will not aid a volunteer to carry into effect an imperfect gift or an executory trust." It is not contended by counsel for the estate that in this case a written declaration of the trust was necessary, the fund being personal property. Such a trust may be created by parol. Crissman v. Crissman, 23 Mich. 216; Bostwick v. Mahaffy, 48 Mich. 342, 12 N. W. 192. But it is contended that, in order to establish a parol trust, the evidence must be very clear and satisfactory, and find some support in the surrounding circumstances and in the subsequent conduct of the parties. This rule is sustained by the case above cited, as well as in Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517; Bailey v. Irwin, 72 Ala. 505; Perry, Trusts, §§ 77, 86. To create a trust, where the donor retains the property, the acts or words relied upon must be unequivocal. Young v. Young, 80 N. Y. 422; 27 Am. & Eng. Enc. Law, p. 56, and cases there cited. And this rule applies with peculiar force where it is claimed that the donor constituted himself trustee. Williams v. Yager, 91 Ky. 282, 15 S. W. 660. In Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, which was cited with approval by this court in O'Neil v. Greenwood, 64 N. W. 511, it was held that, "to constitute a trust, there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created." The mere declarations of an intention or purpose to create a trust which is not carried out are of no value, and a mere agreement or statement of an intent to make a gift in the future is not sufficient. It must be such that, from the time it is made, the beneficiary has an enforceable equitable interest in the property, contingent upon nothing except the terms imposed by the declaration of the trust itself. The rule in relation to the creation of trusts is well stated in Ray v. Simmons, 11 R. I. 266, as follows: "A person need use no particular form of words to create a trust or to make himself a trustee. It is enough if, having the property, he conveys it to another in trust, or (the property being personal) if he unequivocally declares, either orally or in writing, that he holds it in præsenti in trust or as a trustee for another." Many cases are cited in support of this proposition. The general rule is laid down in Perry, Trusts, § 86, as follows: "When a person sui juris, orally or in writing, explicitly or impliedly declares that he holds personal property in præsenti for another, he thereby constitutes himself an express trustee."

From an examination of the testimony in this case, it is evident that no trust was ever created, and the most that can be said of it is that it was the intent of Mrs. Hall at some future time to give to Mrs. Hamilton the sum of $1,000. But counsel contends that the payment of interest, and the promise to pay interest in the future, evidences the setting apart of the fund as the money of Mrs. Hamilton. We think not. Mr. O'Keefe testified, upon that point, that Mrs. Hall said that there was no particular time she was obliged to give it to Mrs. Hamilton, only she was going to give it to her as she saw fit,—saw that she could; that Mrs. Hamilton wanted her to give it to her all at once, but she would not do

that; she wanted to give it to her in small amounts along, so that Mrs. Hamilton would use it for her own personal use. It appears, therefore, very plain that there was no fund set apart, and the payments made, whether of principal or interest, were only to help Mrs. Hamilton as her needs demanded. It is evident that there was an intent on the part of Mrs. Hall to make a gift at some indefinite time in the future, but she set apart no fund for that purpose. It is very different from the case of O'Neil v. Greenwood (Mich.) 64 N. W. 511. There Mr. Willey intended to set apart, and did set apart, the notes and certificates as the property of Lavolette O'Neil and Calista Warner, though he retained possession of them and appropriated the income. At his death he left the fund intact as evidence of the execution of the trust. The testimony here falls far short of establishing an executed trust, one which can be enforced. Under this evidence we think it could hardly be contended that Mrs. Hamilton could have enforced the agreement against Mrs. Hall during her lifetime, and the court was not in error in holding that no trust was ever created, and very properly directed verdict and judgment in favor of defendant. That judgment must be affirmed. The other justices concurred.

CHAPMAN v. CHAPMAN et al.
(65 N. W. 215.)

Supreme Court of Michigan. Dec. 10, 1895.

Appeal from circuit court, Wayne county, in chancery; George S. Hosmer, Judge.

Bill by Albert J. Chapman against Grace A. Chapman, impleaded with another, to have a life estate declared in certain land. A demurrer to the bill was sustained, and complainant appeals. Affirmed.

John Galloway and James H. Pound, for appellant. Ed. E. Kane, for appellee Grace A. Chapman.

LONG, J. The bill in this case was filed to have a life estate declared in complainant to lot 6, block 14, Crane & Wesson's section of Forsyth's farm, in the city of Detroit. The bill, in substance, sets out that, in August, 1879, complainant borrowed from one Samuel F. Hopkins the sum of $1,000 for the purpose of purchasing a home for himself and family; that the same was borrowed upon the understanding with Hopkins that it was to be used for such purpose; that complainant's wife, at that time, was informed of the purpose for which it was borrowed; and that the home so purchased was to be used and occupied by complainant and wife, as such, so long as each should live. The title was taken in complainant's wife. They had two children at the time of the purchase. A mortgage was executed to Hopkins to secure the payment of the moneys. The parties entered into possession, and continued to reside there together until the spring of 1891, when complainant's wife and daughters left the home, and went to reside elsewhere, the complainant continuing to occupy the premises and making improvements thereon. In November following, complainant's wife died, leaving a last will and testament devising the property to her two daughters. The bill was demurred to in the court below and the demurrer sustained. The claim here is that the property was held in trust by complainant's wife for him and his family.

It does not appear, by the bill, that any writing ever existed between the complainant and Hopkins in reference to these lands, or between complainant and his wife. The moneys were borrowed from Hopkins to make the purchase, and the title taken directly to the wife, and all the claim which the bill sets up to establish the life estate in complainant is shown to rest in the declarations of complainant to Hopkins, and the claimed understanding between complainant and his wife, that the premises should be kept as a home for complainant and his wife during each of their lives. Section 6179, How. Ann. St., provides: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized in writing." We think there is nothing set up in the bill which would bring the case out of this statute. A resulting trust cannot be created, except by act or operation of law, or by one of the other methods pointed out by this section of the statute. All that can be said is that, under the allegations in the bill, the complainant's wife knew how the lands were purchased, and agreed with her husband that it should be a home for the family and for themselves so long as they lived. The title vested absolutely in the wife, and under the statute she could devise or convey it at will, without interference of her husband. In Shafter v. Huntington, 53 Mich. 315, 19 N. W. 11, Mr. Justice Champlin, speaking of this statute, said: "Since the passage of the foregoing enactments (section 6179, How. Ann. St.) in 1846, no express trust has ever been allowed to be ingrafted by parol conveyance, but has universally been held to be void." One of the daughters consented to release to her father, but the other refused to do so. The circumstances stated in the bill show that the situation of the complainant is peculiarly unfortunate. He has spent many years in this homestead, expending large sums of money in beautifying and improving it, and his two daughters, defendants in this case, now claim to hold the legal title and right to immediate possession; but, whatever the hardship may be, it is not for the courts to set aside the statute, or be guided by any other rule than that which the statute so plainly lays down. The decree of the court below, sustaining the demurrer, must be affirmed. The other justices concurred.

WHITE et al. v. RICE et al.
(70 N. W. 1024.)

Supreme Court of Michigan. April 27, 1897.

Appeal from circuit court, Cass county, in chancery; Orville W. Coolidge, Judge.

Bill by Nathaniel White, Henry Ferrel, and E. D. Bronner, as trustees and agents of the Methodist Episcopal Church, against Samuel Rice, the Pleasant Valley Congregation of the Brethren Church, and others, for an injunction. From an order overruling a demurrer to the bill, the defendants appeal. Affirmed.

Howell & Carr and L. A. Tabor, for appellants. Harsen D. Smith, for appellees.

LONG, C. J. This bill is filed for the purpose of obtaining an injunction restraining the defendants from interfering in any way with the Methodist Episcopal Church Society and the complainants in using a certain church edifice in which to hold religious services, and to prevent the defendants from interfering with the complainants in opening and entering said church for religious services. Upon the filing of the bill an injunction was issued and served upon the defendants in accordance with the prayer of the bill. The defendant the Pleasant Valley Congregation of the Brethren Church filed a general demurrer to the bill, setting out that the bill did not state a cause which entitled the complainants to any relief whatever. The other defendants answered the bill. The cause came on to be heard on the demurrer. The court overruled the demurrer, without costs, and gave the defendants 30 days to answer. The appeal to this court is from the order overruling the demurrer.

It appears by the bill that the Pleasant Valley Congregation of the Brethren Church is a corporation organized and existing under chapter 170, How. Ann. St.; that in 1890 it owned a church building, which burned during that year; that subsequently negotiations were entered into between the members of that corporation and the members of the Methodist Episcopal Church Society, called the "Bethel Class, Vandalia Circuit," and other persons in the neighborhood, to raise a common fund with which to rebuild such church edifice, and which it was agreed should be used, not only by the Pleasant Valley Congregation, but by other denominations in common with them,—that is, the Baptist, Disciple, Methodist, Congregational, and Presbyterian denominations. The Pleasant Valley Congregation then claimed to have $930, which had been obtained from insurance on the old building, and that, if $400 would be raised by the other parties who were interested in the erection of the church edifice, and not belonging to the Pleasant Valley Congregation, but belonging to the other denominations, the Pleasant Valley Congregation would build such church upon what was called "White's Four Corners," and that such church should be open to worship by the other denominations above enumerated. The bill further charges that Walter Clark, the minister in charge of the Pleasant Valley Congregation, represented to the complainants White and his wife, Ella White, that it would locate such church upon White's Four Corners, on the land of said White, if the site could be obtained therefor, and that the complainant White stated that he would furnish the site and donate $100 for erecting the building on the express condition that it should be used only for church property, and that when erected, and when not in use by the Pleasant Valley denomination, it should be open for use by the Methodist, as well as the Baptist, Congregational, Presbyterian, and Disciple churches; that in that neighborhood there were people connected with said different denominations, either as members or in belief, and that they wanted a church in which they would be at liberty to worship; and that upon this condition, and no other, would he give said site or contribute the $100; that his proposition was accepted by said Walter Clark in behalf of said church; and that a deed was made and delivered on May 30, 1891. The deed expressed the consideration of "one dollar and other considerations hereinafter stated." After the description in the deed, it recited: "For and during the period or term that said land shall be used for church purposes, and no longer, said church, when on said site, shall, when not in use by the party of the second part hereto, be open for use to the following orthodox denominations, to wit, the Baptist, Disciple, Methodist, Congregational, Presbyterian, together with all and singular the hereditaments," etc. This deed was executed by Nathaniel White and wife to the Pleasant Valley Congregation of the Brethren Church, a body corporate under the laws of Michigan. The bill further alleges that in 1894 the quarterly conference of the Niles district authorized the Vandalia circuit to hold meetings in this building, and then made it a part of the Vandalia charge, and called it the "Bethel Class"; that the trustees of the Pleasant Valley Congregation, then denying that the complainants and the Methodist society had any right to occupy the church, excluded them therefrom. The bill contains the usual prayer for injunction, as above set forth, and further prays that the verbal agreement by which the contributions were made may be decreed to be specifically performed, and that the deed be decreed to create a trust, and that such trust may be enforced. The injunction which was issued in the case contains the command to the defendants that "you do absolutely desist and refrain from interfering in any way with the said Methodist Episcopal church and society, and using said church to hold religious services therein, and preventing the said complainants from opening and entering said church in order that meetings may be held by the said church and society under the deed of conveyance of said church premises; and also restraining and strictly

forbidding from preventing the Reverend H. H. Miller or any other minister of said society from entering said edifice as the minister and said pastor of the same, and in any manner interfering with him in holding religious services therein, and in his discharge of his duties as such pastor and minister in charge of such society, and to refrain from interfering in any manner with the rights of the said Methodist Episcopal church and society, or with the complainants, to open said church; that the same may be opened, used, and occupied for religious services; that the said church should be opened; and that you and each of you shall refrain and absolutely desist against locking the doors of said church, from locking said church against said complainants and the Methodist Episcopal church and society, until the further order of this court."

It is contended by counsel for the defendants: (1) That under the statute a trust cannot be created or exist in real estate by parol; that the same must be evidenced by some writing. (2) That the deed in controversy is not a trust deed. (3) That the complainants cannot maintain this bill. (4) That an injunction is too broad, as it, by its terms, takes the possession of the church property from the defendants, and turns it over to the complainants.

1. As to the first proposition, it may be said that the recitations in the bill simply show the surroundings and situation of the parties at the time of the execution of the deed, as well as the consideration for which the deed was given. Such consideration may always be shown by parol testimony.

2. We think the deed itself creates a trust in favor of the denominations named therein, which may be enforced in equity. Sections 5573–5575, How. Ann. St., provide for the creation of a trust for the beneficial interests of any person when such trust is fully expressed and clearly defined upon the face of the instrument creating it. No particular words are necessary to create a trust. Chadwick v. Chadwick, 59 Mich. 92, 26 N. W. 288. In the deed the trust is fully stated. Four hundred dollars was raised by the other denominations, and used in the building of the church edifice. The title to the property was taken in the Pleasant Valley society, but the deed expressly declares that said church, "when on said site, shall, when not used by the party of the second part hereto, be open for use to the following orthodox denominations, to wit," etc. No other interpretation could be given to this language than that it was the intent of the parties to the deed that these other societies should have the use of this church edifice when not in use by the Pleasant Valley society; and the breach set out is that these other societies were denied absolutely the use of the church edifice at any and all times. But it is said that a corporation has no powers except those conferred upon it by statute, and that the statute does not authorize it to act as a trustee in a trust, and that such power is ultra vires. We think it is now well settled that a corporation with legal capacity to hold property may take and hold it in trust, when authorized by law, in the same manner, and to the same extent, as private individuals may do. Society v. Atwater, 23 Conn. 34; Mason v. Trustees, 27 N. J. Eq. 47; Maynard v. Woodard, 36 Mich. 423; 4 Am. & Eng. Enc. Law, 218. The claim that is made that the beneficiary in a trust for religious purposes must be a corporation organized under the laws of this state has no force. Section 4640, How. Ann. St., refers to the legal title or interest in the grantee or trustee, and not to the beneficiary in the trust, as, under section 4637, the lands conveyed to any person as trustee may be held in trust for the use of any congregation or religious society organized within this state.

It is further contended that the beneficiaries named in the deed are indefinite, and that the trust, if sustainable at all, can only be sustained on the doctrine of charitable trusts, which is claimed to be founded on the English statute of charitable uses, and that this statute has never been adopted in this state. However this may be, trusts are enforceable in this state the same as they were at the common law, subject to the provisions of our statute. They must be fully expressed and clearly defined upon the face of the instrument creating them. The beneficiaries here named are the members of the several specified denominations residing in the vicinity of the church. An unincorporated society or a voluntary association, like a religious society or denomination, is capable of taking as a beneficiary in a trust. Society v. Fitch, 8 Gray, 421; Smith v. Bonhoof, 2 Mich. 116. See, also, Tomlin v. Blunt, 31 Ill. App. 234.

3. The claim that the complainants are not proper parties to bring this bill has no force. They showed by their bill that they were the trustees and agents of the Methodist Episcopal Church, and were acting in behalf of those and all other persons of said church, and all having a like interest. That question was settled in Fuchs v. Meisel, 102 Mich. 367, 60 N. W. 773.

4. We think the injunction does not turn the Pleasant Valley society out of the church building, but simply goes to the extent of preventing that society or its members from locking the doors of the church against the other societies and their members named in the deed. The order of the court below overruling the demurrer will be affirmed, with costs against the defendants. The other justices concur.

PERKINS et al. v. NICHOLS et al.

(11 Allen, 542.)

Supreme Judicial Court of Massachusetts. Essex. January Term, 1866.

D. Roberts for plaintiffs. J. A. Gillis, for defendants.

COLT, J. This case comes before us for a hearing upon the bill and answer alone. The general rule in equity, that the answers of the defendants, so far as they are responsive to the bill, are evidence in their favor, and must prevail unless controlled by opposing proof, is not controverted. A distinction is made and relied on by the plaintiffs between those allegations which are responsive and those which are mere defensive allegations in the nature of pleadings. It is not always easy to draw the line between them. In this case it is not necessary to decide whether the facts stated in the answer are strictly responsive or not. When no replication is filed by the plaintiff, no issue made upon the truth of the defendant's allegations, but the cause is set down for hearing on the bill and answer, then the answer is to be considered as true throughout, in all its allegations, whether responsive or not; otherwise the defendant would be precluded from proving the allegations which are only defensive. Buttrick v. Holden, 13 Metc. 356; Brinckerhoff v. Brown, 7 Johns. Ch. 217; 2 Daniell, Ch. Prac. 840, note, 998.

The inquiry then is, whether upon this case as presented an equity is raised requiring the court to decree a conveyance to the heirs of Sarah F. Gardner of the real estate named in the receipt of the defendant Nichols, dated February 2, 1846.

Whenever an estate has been purchased in the name of one person and the purchase money has proceeded from another, a resulting trust arises in favor of the party paying for the property, and the nominal purchaser is held in equity as a mere trustee, upon the presumption that the party paying for the estate intended it for his own benefit. This presumption does not arise in a few excepted cases, where from the relation of the parties the payment may be supposed to be a gift to the nominal purchaser; as, for instance, where the purchase money is paid by the husband and the conveyance is to the wife; but even then the trust may be established by proof that the husband did not intend to give to the wife the beneficial interest in the estate. Whitten v. Whitten, 3 Cush. 191. The presumption arising from the bare payment of the consideration may in all cases be controlled and rebutted by other evidence showing that the party making the payment did not intend to become the equitable owner of the estate; but ordinarily, in the absence of such proof, the presumption stands, and courts of equity will enforce the trust in favor of the real purchaser, and decree a conveyance to him. McGowan v. McGowan, 14 Gray, 119; Buck v. Warren, Id. 122, note.

The defendants in this case allege and offer to prove that at the time the defendant Nichols received the conveyance of the estate he was but a nominal purchaser; that the money paid for it was furnished by Samuel Gardner; that, though the money was handed to him by Mrs. Gardner, and the writing of February 2, 1846, given to her, yet she was in that transaction acting as the agent of her husband; that the land was purchased for him, and belonged to and was always treated by him and his wife as his property, and not the wife's, and that she at no time during her life made any claim to the same. Taking these allegations to be true, and applying the doctrine in equity above stated, it is plain that if the deed had been given to Mrs. Gardner at the time of the sale, she would have held as trustee for Samuel Gardner and his heirs; and it follows that the defendant Nichols, who took the conveyance to himself, held under the same resulting trust in favor of Samuel Gardner and his conveyance to the defendant Mrs. Putnam, as heir to Gardner, was a proper discharge of the trust. Nor is it any objection that the facts upon which this trust is to be established must be made out by parol evidence, even though the recital in the deed that the consideration was paid by the nominal purchaser is thereby contradicted. The facts being proved by any competent evidence, written, verbal or circumstantial, the trust follows by implication of law. Gen. St. c. 100, § 19; Livermore v. Aldrich, 5 Cush. 431, Peabody v. Tarbell, 2 Cush. 226; Browne, St. Frauds, § 92.

Upon the whole case, no equity is shown to compel a specific performance of the writing signed by Nichols, or the cancellation of the deed from him to Mrs. Putnam. And reaching this result, it is unnecessary to consider the objection taken by the defendants, that there is no sufficient description of the boundaries of the estate upon which to found a decree.

Bill dismissed, with costs.

GOLDSMITH et al. v. GOLDSMITH.

(39 N. E. 1067, 145 N. Y. 313.)

Court of Appeals of New York. March 12, 1895.

Appeal from city court of Brooklyn, general term.

Action by Annie Goldsmith and others against Leopold Goldsmith. From an order of the general term (25 N. Y. Supp. 993) affirming a judgment for plaintiffs, defendant appeals. Affirmed.

Samuel Greenbaum, for appellant. Jerry A. Wernberg, for respondents.

FINCH, J. The findings in this case show a situation which permits the application of an equitable remedy. They establish that Mrs. Goldsmith, while the owner and in possession of a house and lot known as the "Myrtle Avenue Property," met with an accident which incapacitated her for its further care and management, and induced her to commit it to her son, the defendant, Leopold. That son was of age, but unmarried, and lived with the family, which further consisted of four children, three daughters and one son, all of them, with perhaps a single exception, minors, and two of them under 10 years of age. The Myrtle avenue property furnished a home for the family, which was supported partly by the rental of a portion of the house, partly by the husband and father, and to some extent by the labor of Annie, the eldest daughter, upon whom the household management devolved after the disability of the mother. The means of the family were narrow and limited. The home which they occupied was very essential to their comfort and support, but even that was incumbered by a mortgage, the annual interest of which was a charge upon their resources. In this state of affairs, the findings show that the mother conveyed the house and lot to her son, Leopold, upon a promise on his part to hold it for the benefit of the other four children in common with himself, and give to them their shares in it. He paid no consideration for it beyond the promise thus made. It was a further part of the arrangement that he should have all the accruing rents, but should pay the interest on the mortgage and the taxes on the property, and was to have his board in the family without charge. In pursuance of this arrangement, the deed was executed and delivered, and Annie herself took it to the clerk's office for record. It is quite evident that this was an arrangement founded upon the relation of mother and son and brothers and sisters, involving the trust and confidence growing out of that relation, and intended as a settlement of the family affairs. It furnished a home for all, in which they were to have a common right, and which was to be for their joint benefit. The deed was made in February, 1887. The mother died in March of the next year. The plan originally adopted was carried out during her life and for some considerable time after her death. The daughters furnished Leopold his board, without compensation or charge, as was arranged, and occasionally paid out small sums for ordinary repairs of the house. A time came when Leopold sold the Myrtle avenue property, and with a portion of the proceeds bought a house and lot on De Kalb avenue. There is evidence that on this occasion he was asked to take a deed in the name of all the children interested, but objected, on the ground that it would be troublesome and inconvenient, and promised to execute a separate paper acknowledging and securing their rights in the property. Soon after he totally repudiated the agreement, and claimed to be the sole and absolute owner of the property, and now defends against the children, insisting that the agreement, if made, was void for uncertainty, and because it rested solely in parol.

There was enough of evidence to warrant the finding that Leopold, at the time of the conveyance, promised his mother that he would hold the property in trust for the plaintiffs herein. What he said on that occasion was expressed in somewhat different terms by different witnesses, but the substance of all of it concurred in the promise that he would hold the legal title for the benefit of the plaintiffs. That agreement was reflected in the actions of both parties for some years after it was made, and induced the plaintiffs to do what otherwise they would not have done, and furnish Leopold his board without charge. The conduct of the latter in now denying the rights of the plaintiffs operates as a manifest fraud upon them, and upon the purpose of the dead mother in seeking to provide for her children. It would be a reproach to equity if it proved unable to redress such a wrong.

It may be granted that no express trust was created, and that the judgment cannot be sustained on that ground, but we think the case is one in which equity will raise out of the situation, from the grouped and aggregated facts, an implied trust to prevent and redress a fraud, and which trust will be unaffected by the statute of frauds, and may properly be enforced. The general rule was declared in Wood v. Rabe, 96 N. Y. 425, 426, to be that when a person, through the influence of a confidential relation, acquires title to property or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. It was added that, while the fraud must be something more than the mere breach of a verbal agreement, yet, where the transaction is one between parent and child, and involves the greatest confidence on one side and the greatest influence on the other, the case is one in which equity may properly intervene. One of the findings in this case is "that, at the time said deed was delivered, the defendant understood that his mother reposed confidence

in him, and with that understanding accepted the conveyance and the confidence of his mother." There is no room to doubt the truth of that finding. There was not only involved the relation of mother and son, but that of brothers and sisters, for whose benefit the agreement was made. The absence of a formal writing grew out of that very confidence and trust, and was occasioned by it, as was also the subsequent performance by the children of the condition to furnish board without pay. Upon the whole transaction, therefore, including the confidential relation of the parties and its nature as a family arrangement, very much beyond a mere business relation, we think it was competent for a court of equity to impress upon the property and its proceeds an implied trust for the benefit of the children. It is true that an intended fraud is not explicitly and by the use of that word charged in the complaint, but all the facts are there fully and clearly stated, showing the fraud attempted to be perpetrated, and all that is omitted is the word or expression characterizing the necessary inference. We have held that such an omission, after judgment, is not material, where the facts themselves have been sufficiently pleaded. Whittlesey v. Delaney, 73 N. Y. 575. We think, therefore, that there was no error in awarding the relief, and that the judgment and order appealed from should be affirmed, with costs. All concur. Judgment affirmed.

CONNOLLY v. KEATING et al.

(60 N. W. 289, 102 Mich. 1.)

Supreme Court of Michigan. Sept. 25, 1894.

Appeal from circuit court, Hillsdale county, in chancery; Victor H. Lane, Judge.

Suit by Kate Connolly against Kate J. Keating and others. Decree for complainant. Defendants appeal. Affirmed.

LONG, J. This bill is filed for the purpose of setting aside a deed executed by Julian La Moore and Anna La Moore, his wife, to Peter Keating, deceased, and to declare the title to the premises described in said deed to be in the complainant. The complainant's contention is that in November, 1887, she placed in the hands of Peter Keating the sum of $500, with which to purchase for her the lands described in the La Moore deed, and to have the title vest in herself, or in Peter Keating as trustee for her; that Keating took the money, made the purchase from La Moore, and took the title to himself absolutely, without her knowledge or consent, and against her express directions and requests; that, after the deed was executed, Mr. Keating put it upon record and afterwards delivered it to her, since which time it has been in her possession, but that while Keating lived she never examined the deed, to see its contents, because during all that time no question as to her title was raised; that after the deed was executed she made substantial improvements upon the property, rented it, and collected the rents, and exercised all the acts of ownership over it until the death of Keating, December 31, 1890, when for the first time she learned that the deed was taken in his name absolutely, and that his heirs and representatives, the defendants in this case, disputed her title thereto. On the hearing in the court below there did not seem to be any dispute but that the complainant furnished the money with which Peter Keating purchased the premises in controversy, but the defense was that the complainant well knew that Peter Keating took the deed in his own name, and that the absolute title to the premises, during his lifetime, vested in him, and that the complainant had no right to relief, as she could not establish a trust in these lands by parol. The court below, after a hearing in open court, found the complainant was entitled to the relief prayed, and decreed that the title should vest in her.

There are but two questions raised in this court: (1) That this suit being brought against the estate and the heirs of Peter Keating, now deceased, complainant could not testify to matters equally within the knowledge of deceased; (2) that the grant being made to Peter Keating, and the title vesting in him absolutely, though payments therefor may have been made by complainant, under the statute a trust could not be shown by parol evidence.

The complainant was called as a witness, and testified in the case to many matters which could not have been within the knowledge of the deceased, and as to those matters her testimony may be considered. As to the matters which were equally within the knowledge of the deceased, the rule is too well settled to need the citation of authorities that her testimony cannot be considered in determining the question involved here.

Upon the second point, section 5569, How. St., provides: "When a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee, subject only to the provisions of the next section." This section stands as section 7, c. 214, entitled "Of Uses and Trusts." By section 5571, being section 9 of that chapter, it is further provided: "The preceding seventh section shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name without the knowledge or consent of the person paying the consideration, or when such alienee in violation of some trust shall have purchased the lands so conveyed with money belonging to another person." In Fisher v. Fobes, 22 Mich. 458, Mr. Justice Cooley, speaking of section 5569, says: "This provision, however, must be understood as applicable only to those cases in which the deed has assumed the form it has by the consent of the party furnishing the consideration. It has no application to a case where one has taken a deed in his own name in fraud of the rights of another, nor to a case where, though no fraud was designed, the conveyance has been made to some person other than the purchaser, without his consent." In McCreary v. McCreary, 90 Mich. 478, 51 N. W. 545, the same rule was laid down, Fisher v. Fobes being cited and approved. It is therefore well settled in this state that if Peter Keating took the deed with the understanding with complainant either that it was to be executed to her, or to himself in trust for her, and then, without her knowledge or consent, and against her express directions and requests, took the deed in his own name, a court of equity will, upon proof of these facts, decree the title in the complainant. We think the testimony abundantly shows, without considering the testimony of the complainant relating to facts which were equally within the knowledge of Keating, that the complainant never assented that he should take the absolute title to the premises, and that the court below was not in error in so finding. The decree below will be affirmed.

MONTGOMERY, J., did not sit. The other justices concurred.

MOORE et al. v. CRAWFORD et al.

(9 Sup. Ct. 447, 130 U. S. 122.)

Supreme Court of the United States. March 18, 1889.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Appellees, the widow and heirs of John Monroe, deceased, filed their bill against Nathaniel D. Moore and Helen Moore, to compel a conveyance of the one undivided sixth part of 160 acres of mineral land in Ontonagon county, Mich., which had been located by Nathaniel D. Moore, under an agreement with James H. McDonald and John McKay that Moore should have a one-third interest in consideration of his services in prospecting for land having iron ore, and selecting and locating that in question. It was upon Moore's application that the patent was issued from the state land-office at Lansing, in January, 1875, to McDonald and McKay, the purchase money being furnished by them and paid over by him. By the testimony of Moore and McKay it was established that Moore was to have a one-third interest, while McDonald admitted that he was to have an interest, but was uncertain whether it was to be one-third or one-fourth. One McIntyre testified that the agreement between Moore, McDonald, and McKay was in writing, and signed in his presence by McDonald and McKay; but he was not sure whether Moore signed it or not. The execution of such an agreement was denied, and the circuit court considered McIntyre's testimony too indefinite as to its terms to warrant proceeding upon it. On the 18th day of October, 1875, Moore, who was then unmarried, executed and delivered to John Monroe a deed in fee-simple, with covenants of seisin, against incumbrances, and of general warranty, for an undivided one-sixth interest in said lands, which was duly recorded December 20, 1875. The consideration was $250, of which Monroe paid $10 in cash, and for the residue gave his promissory note to Moore, payable one year after its date. Moore informed Monroe at the time that he had arranged with McDonald and McKay for a one-third interest, and that the deed was then probably made out. Pursuant to their agreement, McDonald and McKay, some time in 1875, executed a deed to Moore for a one-third interest in the land, which was deposited with one Viele, to be delivered to Moore when McDonald and McKay should direct. McDonald testified that Moore was indebted to him, and he wished delivery delayed until the debt was arranged and satisfied, which was finally effected in 1877. Moore does not seem to have known about the execution of this deed, and it appears to have been subsequently lost. McDonald and McKay never denied Moore's right to his interest, but always admitted it, and McDonald testifies that it was understood that Moore should have the interest any time he called for it. In December, 1880, McDonald and McKay conveyed an undivided one-third interest in the land to Helen Moore, wife of N. D. Moore, who requested the conveyance to be made to his wife for the express purpose, as he admitted, of defeating the deed he had previously given to Monroe for one-sixth of the land. Monroe died intestate in Colorado in August, 1878, and Moore, knowing that his deed to Monroe had been recorded, expected Mrs. Monroe would make trouble. No consideration passed when McDonald and McKay executed and delivered this conveyance, and Mrs. Moore was not present when it was executed, but she had been informed by her husband that it was to be made to her, and had full notice of his deed to Monroe. Since the conveyance to Helen Moore, N. D. Moore has substantially managed the property as if it were his own. Further reference to the pleadings and evidence is made in the opinion. Hearing having been had upon bill as amended, answer, replication, and proofs, the circuit court, Judge SAGE presiding, delivered its opinion, which is reported in 28 Fed. Rep. 824, and decree was thereupon entered for conveyance to complainants as prayed, and for rents and profits from the date of the filing of the bill, less the amount due on the $240 note, from which decree this appeal was prosecuted. Mrs. Moore having died pending the appeal, Nathaniel D. Moore, Jr., her sole heir at law, and John McKay, administrator of her estate, were made co-appellants with Nathaniel D. Moore.

John F. Dillon, *Dan H. Ball*, and *Irving D. Hanscom*, for appellants. *T. L. Chadbourne* and *L. H. Boutell*, for appellees.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

Had the conveyance of McDonald and McKay, lodged in Viele's hands, been actually delivered to Moore, no question would have arisen; but, that deed having been suppressed or lost, when Moore subsequently induced McDonald and McKay to convey to his wife, for the avowed purpose of avoiding the deed he had given Monroe, Moore's wife being fully advised of the purpose, and paying no consideration for the conveyance, the transaction must be regarded in equity as if McDonald and McKay had conveyed to Moore, and Moore had conveyed to his wife, she holding in trust for Monroe and his heirs one-half of the interest conveyed to her, namely, one-sixth of the whole. "Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by

fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done." 1 Story, Eq. Jur. § 187. Whenever the legal title to property is obtained through means or under circumstances "which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust." 2 Pom. Eq. Jur. § 1053.

In Huxley v. Rice, 40 Mich. 82, it is said: "It is the settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive, by intent or immediate consequence, the party deriving title under it will be converted into a trustee in case that construction is needful for the purpose of administering adequate relief; and the setting up the statute of frauds by a party guilty of the fraud or mistake, in order to bar the court from effective interference with his wrongdoing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects." The fraud of which Moore was guilty was in preventing the conveyance to himself, which would have inured to Monroe, and in obtaining it to his wife, so as to reap the benefit which belonged to his grantee. Mrs. Moore stands in her husband's shoes, and, by accepting with knowledge, is to be treated as a party to his fraud and profiting by it, or, as a mere volunteer, assisting him to perpetrate the fraud and to profit by it, and is hence to be held, as he could have been, a trustee *ex maleficio*. Nor do we see that the statute of frauds can be invoked as a defense. The fact that McDonald and McKay could not have been compelled to convey to Moore because of the want of written evidence of their agreement to do so does not entitle Mrs. Moore to object that they were not legally bound to do what they were morally, they having kept their faith with Moore by conveying under his directions. If McDonald and McKay had violated their agreement with Moore, and in furtherance of such violation had conveyed to a stranger, such grantee might have defended, even though cognizant of the verbal agreement of McDonald and McKay to convey to Moore; but McDonald and McKay never repudiated their obligation to Moore, and conveyed as he directed, thereby, so far as he was concerned, carrying out the trust upon which they held one-third of the land. There is "no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party morally, but not legally, bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not, by reason of some technical rule of law, have been enforced by action." Newman v. Nellis, 97 N. Y. 285, 291; Patton v. Chamberlain, 44 Mich. 5, 5 N. W. Rep. 1037; Barber v. Milner, 43 Mich. 248, 5 N. W. Rep. 92. Mrs. Moore did not take as a stranger would have taken, but took in execution of the agreement with her husband. Clearly, then, she cannot be permitted to set up a statutory defense personal to McDonald and McKay, who could not, in fulfilling their agreement, transfer an excuse for non-fulfilment. It is undoubtedly the rule that the breach of a parol promise or trust as to an interest in land does not constitute such fraud as will take a case out of the statute, (Montacute v. Maxwell, 1 P. Wms. 620; Rogers v. Simons, 55 Ill. 76; Peckham v. Balch, 49 Mich. 179, 13 N. W. Rep. 506;) but here McDonald and McKay did not fail to perform their promise, and, when they performed, their grantee took one-half of the one-third, charged with a trust to hold it for Monroe by reason of the deed of Moore to Monroe, under the covenants of which Moore was equitably bound, when he acquired the title, to hold it for Monroe's benefit. That deed contained a general covenant of warranty.

In Irvine v. Irvine, 9 Wall. 617, 625, Mr. Justice STRONG, speaking for the court, said: "It is a general rule that when one makes a deed of land, covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of his grantee, on the principle of estoppel." And in Van Rensselaer v. Kearney, 11 How. 297, it was pointed out that it is not always necessary that a deed should contain covenants of warranty to operate by way of estoppel upon the grantor from setting up the after-acquired interest against his grantee, the court saying (page 325) "that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies." The rule is thus stated in Smith v. Williams, 44 Mich. 242, 6 N. W. Rep. 662: "It is not disputed that a deed with covenants of seisin and title would be effectual to give the grantee the benefit of an

after-acquired title, under the doctrine of estoppel; but these covenants were absent from the deed in question, and the covenant of quiet enjoyment, it is said, would not have a like effect. No reason is given for any such distinction, and it is not recognized by the authorities. When one assumes, by his deed, to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants had given." Conceding that a covenant of general warranty operates by way of rebutter to preclude the grantor and his heirs from setting up an after-acquired title, rather than to actually transfer the new estate itself, the subsequent acquisition creates an equity for a conveyance in order to make the prior deed effectual. Noel v. Bewley, 3 Sim. 103, 116; Smith v. Baker, 1 Younge & C. Ch. 223.

In McWilliams v. Nisly, 2 Serg. & R. 507, 515, TILGHMAN, C. J., said that equity will enforce a covenant to convey an estate whenever it shall be acquired by the covenantor, and that the case is not the less strong where there is an absolute conveyance; and this is cited by STRONG, J., in Bayler v. Com., 40 Pa. St. 37, 43, wherein it is held that "though a conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration." So GIBSON, J., in Chew v. Barnet, 11 Serg. & R. 389, 392, says: "In the case of a conveyance before the grantor has acquired title, the legal estate is not transferred by the statute of uses, but the conveyance operates, as I have said, as an agreement, which the grantee is entitled to have executed in chancery, as was decided in Whitfield v. Fausset, 1 Ves. Sr. 391." In Way v. Arnold, 18 Ga. 181, 193, Pyncheon, having no title, sold to Way with warranty, and, subsequently acquiring title, sold to Arnold. It was held that "if Pyncheon, upon consideration, conveyed this subsequently-acquired interest, and such was his intention, equity will decree a title to the after-acquired estate, and the second grantee, Arnold, provided he purchased with notice, would be affected by said notice, and could not conscientiously hold the land in dispute." In Goodson v. Beacham, 24 Ga. 150, Mims, by warranty deed, conveyed to Beacham, Mims having no title at the time, but subsequently acquiring it. Goodson claimed title under an execution sale; and the court say, (page 153:) "Mims, when he made the deed to Beacham, had no title, but his deed was an attempt to convey the fee, and it was a deed with a warranty. This shows—*First*, that it was the intention that the land—the whole interest in the land—should be conveyed to Beacham; *secondly*, that Beacham had paid the purchase money. Such being the intention, the consequence would be that, if Mims should afterwards acquire the title, he would be bound to convey it to Beacham, as much so as if the contract were one standing in the form of a bond for titles. Perhaps this would be the consequence, even without the warranty. Taylor v. Dabar, 2 Cas. Ch. 212, 1 Cas. Ch. 274; Wright v. Wright, 1 Ves. Sr. 409; Noel v. Bewley, 3 Sim. 103; Smith v. Baker, 1 Younge & C. Ch. 223; Jones v. Kearney, 1 Dru. & War. 159, cited in note, 2 Rawle, Cov. 438; Sugd. Vend. c. 8, § 2, p. 33; Rawle, Cov. 448."

Treating his deed as a covenant to convey, Moore would have been precluded from denying the title if the deed of McDonald and McKay had been made directly to him; and if, this being so, he could not call in question his own grant, he could not, by interposing a third person, taking without consideration, and to enable the fraud to be carried into effect, in that way defeat it. It was the duty of Moore to take the conveyance for the benefit of Monroe, and Monroe had the right to the enforcement of that duty in equity, in view of the fraudulent device by which Moore attempted to avoid its discharge. The fraud was of such character as enables a court of equity to decree the relief as against the covenantor, not only under his own name, but under the name of his wife; and it will not do, under such circumstances, to say that Monroe is remitted to an action for damages for breach of the convenant of warranty, because Moore not only had no title at the time but never afterwards acquired title; for when the conveyance was made to Mrs. Moore it was, as we have held, as if the title had been acquired by Moore himself. Nor is this a case wherein specific performance of the covenant of warranty is sought upon failure of title in the absence of fraud. It is insisted that, if the deed be regarded as a contract to convey, while in such case the heir would ordinarily be entitled to a conveyance from the vendor, yet if the vendor had no title, or if the vendee was not bound by the contract at the time of his death, the heir is not so entitled; but it appears from this record that Moore could have obtained the title in Monroe's life-time, and the latter could have been compelled to perform on his part, so that the contract was binding at the time of Monroe's death, and his heirs had the right to compel specific performance. The vendor, therefore, would not be liable in one action to the estate, and in another to the heirs.

Monroe died in August, 1878. Moore and McDonald had settled in 1877 the matters which McDonald had given as reasons for not conveying, or for suspending the delivery of the deed placed in the hands of Viele, and McDonald was then ready to convey to Moore, which McKay had always been. Moore was able to perform before Monroe's death, and

the right to compel performance which Monroe had his heirs can enforce.

It is strenuously urged that the deed of Moore to Monroe was set aside by agreement, and the purchase abandoned by the latter. We agree with the learned judge of the circuit court in the conclusion at which he arrived in disposing of this contention. The evidence to make out such rescission practically consists of the testimony of defendant N. D. Moore, given on his own behalf. It is only when an oral agreement is clearly and satisfactorily proven by testimony above suspicion and beyond reasonable doubt that it will be enforced to establish rights in land at variance with the muniments of title, and it is open to question "whether, in any case, after the decease of the grantee, the unaided testimony of the grantor alone, however intelligible and credible he may be as a witness, should be held sufficient to set aside and invalidate the title claimed under it." Kent v. Lasley, 24 Wis. 654. "Where a written instrument is sought to be reformed upon the ground that by mistake it does not correctly set forth the intention of the parties; or where the declaration of the mortgagor at the time he executed the mortgage, that the equity of redemption should pass to the mortgagee [is relied on;] or where it is insisted that a mortgagor, by a subsequent parol agreement, surrendered his rights, * * * in each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory—if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy—the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence." Howland v. Blake, 97 U. S. 624, 626. Tested by this rule, the evidence is manifestly insufficient to defeat the deed from Moore to Monroe. It must be conceded that the party interposing such a defense should be able to set it up with reasonable accuracy in his pleadings, and Moore's statement on the stand varies so much from that given in his answer as to make it impossible to indulge in any presumptions in its favor. The circuit court justly comments on this conflict between answer and testimony (28 Fed. Rep. 831;) but that ground need not be minutely gone over again here.

The consideration for the one-sixth interest was $250,—$10 in cash, and a note for $240.

Immediately before the purchase of the land in controversy Monroe had let Moore have money to enter a particular 40 acres which he represented had such indications of mineral as showed it would be valuable. Moore did not make the entry because, he says, the land had been previously entered, but he did not return the money to Monroe. The 40 acres was school land, and the minimum price of school lands was fixed by statute at $4 per acre, (1 Comp. Laws Mich. 1872, p. 1251,) or, for 40 acres, $160; and the presumption, in the absence of evidence to the contrary, would be that this was the sum Monroe let Moore have, the purpose to make the particular entry being conceded. Now, Moore's story as to the rescission is that Monroe came to him and "wanted me to pay him the money that he had given me to enter that land," and that in the conversation that ensued reference was made to the fact that Moore had not yet received a deed to the McDonald and McKay land, and it was finally agreed that Moore should give Monroe his note for $160 and surrender Monroe's note for $240, and that Monroe should give up his deed; and Moore claims that the money which Monroe had given him to enter the 40 acres of school land was $150, and that the $160 note was made up of that $150 and the $10 which had been paid on the purchase. When confronted with the fact that he had sworn that Monroe gave him the money to enter 40 acres of school land, the minimum price of which was $160, his explanation is that, as Monroe had to pay a discount to get the money, "I told him that I would throw off the $10 on that account," though why Monroe could not borrow $160 as well as $150, if he borrowed at all, or why Moore should "throw off" $10 to the party who advanced the whole capital, or whether Moore had $10 to make up the deficiency, (and he admits that he was then quite impecunious,) does not appear. Whether the money Monroe had let Moore have was $150 or $160, and whether the note included the $10 paid on the one-sixth interest, depends on the testimony of Moore. Mrs. Monroe found the note among her husband's papers after his death, and knew nothing about it except that he told her that it was for money he had loaned Moore. The note itself was not produced. Payments had been made upon it in Monroe's life-time, but none afterwards, until 1881, when $60 was paid to Mrs. Monroe, who cannot remember what the amount of the note was; and this payment was after McDonald and McKay had conveyed to Mrs. Moore, at the request of Moore, for the purpose of cutting out the deed to Monroe, and after the land had commenced to increase in value, to Moore's knowledge, but not to that of Mrs. Monroe. When it was made not a word was said to Mrs. Monroe about the outstanding deed to Monroe, either as to having it sent back or having a quitclaim given, and it is quite clear that she was wholly unaware of any connection between that note and the land in controversy, if any such connection in fact existed, as it would seem there did not, if the amount Monroe let Moore have to make the entry was $160. Some small payments had been made on this note to a justice of the peace, in whose hands it had been lodged for collection. He was not sworn as a witness, but Moore is

"inclined to think that he is dead." Under the circumstances, it is remarkable that the note when taken up by Moore was not preserved by him, and is not put in evidence. The money was not in fact loaned to Moore by Monroe, but given to him for a particular purpose, and, when that purpose could not be effectuated, should have been returned at once. Monroe is dead. Is it not dangerous to take Moore's testimony, in face of these facts, as establishing that the $160 covered the $10 forming part of the consideration of the purchase under consideration? We think it is, and particularly as in his answer Moore does not set up that the money was given him for the entry of a specified tract of 40 acres, nor state any reason why it was $150 instead of $160, but says the money was furnished by Monroe to enter land, "if he should know of any that was desirable."

Equally unsatisfactory is the evidence as to Monroe's note for $240. Moore alleges in his answer that it was part of the agreement to rescind that he should cause this note to be surrendered to Monroe, and that one John McKay, in whose possession it was, "as he had been previously requested by said Nathaniel D. Moore," delivered the note to Mrs. Monroe, and it was canceled; but it is not to be questioned, upon the evidence, that the note was handed to Mrs. Monroe, not at the request of Moore at all, who knew nothing about it until a year, or perhaps nearly six years, afterwards, but at her solicitation; and it was not only not canceled, but carefully preserved, and produced upon the trial, —a fact inconsistent with a rescission to be accomplished by its destruction, but entirely in accordance with Mrs. Monroe's testimony that her getting the note was accidental, and that, as came out on her cross-examination, when she showed it to her husband, he told her "to put it by." Such a direction on his part is irreconcilable with the theory that he had sent her to the McKays for the note because the bargain had been declared off, while it sustains the view that he had no intention to throw up the purchase. This note had been given to William McKay, according to Moore, to raise money on; failing in which, William had left it with his brother John, or his wife, who testifies he gave it to her "to keep, or to give back to Mrs. Crawford, (then Mrs. Monroe,) or to collect." Mrs. McKay was Mrs. Monroe's sister, and gave her the note, cautioning her that she must take care of it, so as to produce it in case it was asked for by William McKay. This was in July, 1876, but Moore fixes the date of the conversation with Monroe as in August or September, or, as he finally believes, early in October, 1876, which, if true, would show that Mrs. Monroe's possession of the note had nothing whatever to do with an agreement that it should be surrendered. Indeed, Moore does not contend that it had, but testifies that Monroe said he could get the note from the McKays, whom, however, Moore does not pretend he directed to deliver it. There is a direct conflict between Mrs. Crawford and the McKays as to her statements at the time she took the note; but we are not inclined, therefore, to reject her account of the transaction, so far as bearing upon whether she had authority to act for her husband on that occasion or not. Granting that Mrs. Monroe was desirous of getting the note, because she feared Monroe would never obtain title, and considered Moore's deed worthless, this did not bind Monroe, and her statements could not be used for that purpose. It should further be observed that, while Moore avers in his answer, which he subscribed, that Monroe was to quitclaim to him, he states in his testimony that Monroe said he had not recorded the deed, and would send it back, although the evidence discloses it was recorded December 20, 1875; and also that, though Moore and Monroe lived at the time within three miles of each other, yet Moore never asked Monroe either to quitclaim or return the deed, now giving as an excuse that he did not wish "to stir it up more than was necessary," and did not wish to urge him while the other note remained unpaid. If he was not entitled to demand a release until he had paid the $160 note, it would hardly be just to allow him to cease paying, and not resume until years after, when the land had increased in value, and Monroe was in his grave, and then treat such payment to Mrs. Monroe, though he kept her in ignorance of any connection between it and the land, as performance of the alleged agreement of five years before.

Upon a careful examination of the evidence, it amounts to no more than this: Monroe expected and desired to obtain the land. He found that McDonald and McKay had not made a deed to Moore, and doubt was expressed whether they ever would. He wished to collect the money which Moore had wrongfully kept, and which had no relation to the other transaction. He retained possession of the $240 note, so that Moore could not make use of it; not intending to cancel it, but to hold it for payment when Moore obtained the title. In accepting payments on the $160 note, he was only receiving what Moore originally owed him, assuming that the $10 was not included. If there ever was such an arrangement as contended for, it was evidently not to be carried out on the part of one unless or until carried out by the other, and was not carried out by either, and the payment of the $60 to Mrs. Monroe, ignorant as she was of the facts, cannot be regarded as acceptance of performance. In any point of view in which this evidence can be considered, we do not feel justified in denying complainants' relief upon the ground of an abandonment of the deed of Moore to Monroe. In our judgment, the defense of laches is not made out, even if the minority of the heirs did not preclude it. The deed of McDonald and McKay to Helen Moore is dated December 16, 1880, and was recorded March 16, 1881.

During all this time Mrs. Monroe and her children were living in Canada. Mrs. Monroe, when on a visit to Houghton county, in the summer of 1881, first learned that Moore disputed their title, and in the fall of that year she was advised by Mr. McKay to "hire a lawyer or attorney." She did so, and he wrote a letter to Moore, informing him of complainants' claim. Moore testifies as to its receipt that "it must have been in the fall of 1881, or in the spring of 1882. I am not sure of it."

February 8, 1882, this suit was commenced in the circuit court for Ontonagon county, Mich. This cannot be held to be unreasonable delay. The answer of defendants averred: "It is only since said [mineral] discoveries, made at the expense of these defendants and said McDonald and McKay, that these complainants have claimed to have any interest therein;" but all that was done in developing the land was by the Cambria Iron & Steel Company, and no actual discoveries of ore had been made before the bill was filed. Moore is asked by his counsel, and answers as follows: "*Question.* When was it first ascertained that the property had value beyond what you knew of at the time you first went over it for iron ore? *Answer.* The spring of '82 was the first developments that was made on that property by the Cambria Iron & Steel Company. They worked considerably on it in '81, but hadn't shown up anything until the spring of '82." McDonald testifies: "We let an option to the Cambria Iron & Steel Company of Johnstown, Pa., to mine ore if they could find it; gave them a privilege of exploring for iron. If they found iron they was to pay us so much for the iron. * * * That must have been in '81. * * * *Q.* About what time was it that they first developed mineral value there; that is, to show that there was mineral value there? *A.* Well, in the spring. I couldn't say what time that was, but it must have been in the following spring; * * * the following spring after we gave the option." While this shows that Mrs. Monroe had no reason to suppose the land had increased in value when she began her suit, Moore, from his knowledge of the property, and his being on the ground, must have been aware, when he paid Mrs. Monroe, and probably as early as when the deed was given to his wife, that the property was likely to improve in value. He says the option to the Cambria Iron & Steel Company was in 1880 or 1881, and if it was after his wife got her deed, it was shortly after. The inevitable inference from his conduct is that he did not ask McDonald and McKay to convey, and did not propose to pay up the note until roused into activity by the prospect of gain.

The bill and amendments state the deed from Moore to Monroe of one-sixth of the land; that McDonald and McKay held "an undivided one-third thereof in trust for the said Nat. D. Moore by an arrangement between the said McDonald and McKay on the one side, and the said Moore on the other, entered into before or at the time the said McDonald and McKay acquired said title;" that the conveyances by McDonald and McKay to Helen Moore "were made at the instigation of said Nat. D. Moore, with the intent and purpose of defrauding these complainants out of the estate in fee conveyed and assured, and intended to be conveyed and assured, to the said John Monroe by the said Nat. D. Moore as aforesaid, by lodging the apparent legal title in his wife's name, but for his own benefit and use;" "that the said Helen Moore paid no consideration for said conveyance, and that said interest vested in her as trustee for her husband, Nat. D. Moore, and for the said John Monroe, his heirs and assigns;" that the deed to Helen was procured by said Nat. D. and said Helen to be made "for the purpose of cutting out complainants' title to the undivided one-sixth of the said land and of depriving them thereof;" that the transaction "is and ought to be held to be of the same effect as if the said McDonald and McKay and their wives had conveyed said interest directly to the said Nat. D. Moore, instead of to his wife, and that the said Moores, husband and wife, ought to be and are estopped by the terms of Moore's said conveyance to Monroe from claiming or asserting that, as to the one-sixth interest in said land conveyed by the said Nat. D. Moore to the said John Monroe, the said Helen Moore has any title or interest therein as against said complainants; and they further charge that as to said one-sixth interest the title is in them by virtue of the premises; that at the time of said conveyance by Nat. D. Moore to John Monroe said Moore was unmarried, and that said Helen Moore gave nothing for either or any of said conveyances nor for said interest in said land; and that she took the same with full notice and knowledge of complainants' rights, obtained as aforesaid, by deed from said Nat. D. Moore to said John Monroe." The original bill charged also that a conveyance was made by McDonald and McKay to Moore, and fraudulently suppressed before the conveyance to said Helen. We think the allegations of the bill, as amended, are sufficient to support the decree. McDonald and McKay held in trust for Moore; that is, upon the trust created by their obligation to convey to him on request. They not only did not deny the trust, but conveyed on Moore's request to his nominee, and fraud is charged against Moore and his wife in procuring the conveyance to the latter. The prayer of the bill was "that the said Helen Moore be compelled by the proper decree of this court to execute and deliver a good and sufficient warranty deed or deeds of the undivided one-sixth part of said premises to these complainants, in the proportions to which they are respectively entitled, as sole heirs of said Monroe;" and as there is enough in the bill as amended to warrant relief,

and as the defendants could not have been taken by surprise, we do not think the decree should be reversed on the ground that the *allegata* and the *probata* do not sufficiently agree to justify it. It is true, there is no offer to pay the balance of the purchase money, but the case shows that a tender would have been but an empty show, and as the court had it in its power to require payment of the $240 note, thus completing performance by Monroe, and as it did this by its decree, the allegation would have been merely formal and became immaterial. The decree of the circuit court is affirmed.

RICE v. RICE.

(65 N. W. 103.)

Supreme Court of Michigan. Dec. 3, 1895.

Appeal from circuit court, Ionia county, in chancery; Frank D. M. Davis, Judge.

Bill by Julia A. Rice, administratrix of the estate of Wallace Rice, against Alonzo Rice. There was a decree for plaintiff, and defendant appeals. Affirmed.

Clute & Clute, for appellant. R. A. Hawley, for appellee.

MONTGOMERY, J. The bill in this case was filed by the complainant to have the defendant declared trustee of the estate of Wallace Rice, deceased, and to require the assignment to the complainant, as administratrix, of a certain real estate mortgage, delivered and assigned to defendant by Wallace Rice in his lifetime. It appears that, in the spring of 1892, Wallace Rice was a resident of Ionia county, and was worth about $3,500. He was afflicted with a pulmonary disease and desired to go to Colorado in hopes of benefiting his health. His property at this time consisted of the mortgage in question, which amounted to $2,000, and some unsecured notes and other personal property. It appears that, before going to Colorado, Wallace executed to the defendant an assignment of the mortgage, absolute in form, and the sole question in this case, as the same appears to us, is whether, by this conveyance, it is intended to vest a beneficial interest in the defendant, or whether the transfer was made for greater convenience in dealing with the security, in the interests of Wallace and his estate; and we are all agreed that the record does not leave this question in doubt, if we confine ourselves to the undisputed testimony and to facts testified to by the defendant. It is proper to say that we are convinced that the defendant has at no time contemplated a diversion of the property to his own use, but has had in contemplation the preservation of the proceeds of the mortgage for the two minor children of the deceased, but we are unable to find any trust in favor of the children. Either the effect of the assignment was to vest in the defendant an indefeasible right, or a trust resulted in favor of Wallace in his lifetime, and a right remained in him which vested in his estate on his decease. It appears by the testimony that Wallace first prepared a power of attorney to collect the mortgage, and gave it to the defendant. Defendant then said to him, "If you die or something happens to you, I could not collect it." Wallace then took the mortgage back, leaving the power of attorney, and afterwards brought the assignment, saying to the defendant, "You can use it now." It also appears, from the testimony of the defendant, given on his examination had in the probate court, that no consideration passed to Wallace upon this transfer, and on said examination he (the defendant) further testified: "I don't think it was a gift to me. I suppose it was placed in my hands for the benefit of the children. Nothing was said about it. I intended to use the mortgage for the benefit of the children." On the trial of the present case the defendant gave the following testimony: "Q. In case he (Wallace) had lived, and you had collected this money, you would have sent it to him, wouldn't you? A. If he had lived and got well, I presume I should. Q. Don't you know you would? A. Why, yes." This testimony and statement of defendant show that there was no consideration passing to Wallace; that defendant did not understand that the transfer was a gift, but did understand that the beneficial interest was still in Wallace. If this be so, that interest, in the absence of an express trust in favor of the children, passed, on Wallace's death, to his estate. There is no evidence of any declaration of trust in favor of the children. The circuit judge granted the relief prayed, and the decree is affirmed, with costs.

HOOKER, J., did not sit. The other justices concurred.

SPRING v. RANDALL et al.

(64 N. W. 1063.)

Supreme Court of Michigan. Nov. 19, 1895.

Appeal from circuit court, Kent county, in chancery; Allen C. Adsit, Judge.

Petition of Henry Spring to the circuit court. From an order overruling demurrer to the petition, Lewis E. Randall and Marie Van Zant Randall appeal. Affirmed.

Frank L. Carpenter, for appellants. Smiley, Smith & Stevens, for appellee.

LONG, J. This is an appeal from an order overruling a demurrer to a petition filed in the Kent circuit court in chancery. It is shown by the petition that in 1880 the will of Rosalie M. Smith, deceased, was admitted to probate. By its terms the greater part of the large estate passed to Nelson W. Northrup, as trustee, who was to invest, manage, and control the same, and out of the proceeds and income to pay the testatrix's niece, Marie Van Zant, an annuity of $500 during her life, and also all the income of the estate after complying with certain minor directions in the will. The income was to be paid quarterly. On the death of Marie Van Zant, the entire estate was to go to her lawful heirs, or to whosoever she might appoint by will. Mr. Northrup acted as trustee from 1880 to December, 1892, when the court made an order accepting his resignation, which was made in consequence of dissatisfaction between him and Miss Van Zant, and appointed Lewis E. Randall as his successor, and determined that the amount of money due from Mr. Northrup to his successor was $21,820, and specified also the real estate to be conveyed to his successor. Lewis E. Randall accepted the appointment, and filed a bond with the register. The moneys were paid over, and the estate conveyed to him, and he has continued to act as trustee since that time. The petitioner, Henry Spring, is a dry-goods merchant in Grand Rapids. In July, 1888, he began furnishing Marie Van Zant with wearing apparel and other necessities, on credit, and continued so to do until November, 1892; and the petition states: "All said wearing apparel and other necessities were furnished the said Marie J. Van Zant at a time when she represented herself to be unable to pay cash therefor by reason of the litigation then pending between herself and the said Nelson W. Northrup concerning the financial affairs of said estate, and that the said Marie J. Van Zant promised and agreed with your petitioner from time to time to pay for said wearing apparel and other necessities out of the income of said estate as soon as she should receive the same and be able so to do." At divers times after the appointment of the new trustee, Mr. Spring applied to Miss Van Zant for payment of the goods she had obtained from him, but she never paid. In February, 1894, he placed the claim in judgment, and had an execution issued, and the sheriff made diligent efforts to collect, soliciting payment personally from the debtor, but no payment was made, and the sheriff subsequently made return that he was unable to find any property. After the appointment of Lewis E. Randall as trustee, he and Marie Van Zant were married; and it is alleged that they are combining and confederating to prevent the collection of Mr. Spring's judgment; that the trustee holds $21,000 in money and $10,000 in real estate, the income of which all belongs to his wife, the debtor, Marie Van Zant Randall, and the income of which is sufficient to enable her to pay the debt; but that she is making no effort to do so, and is purposely withholding the amount; and that her husband, the trustee, is assisting her in so doing. It is alleged that there is no remedy at law by which the payment can be enforced, and that petitioner is entitled to payment out of the income of the estate. The prayer of the petition is: (a) That the trustee and beneficiary be cited to appear, etc.; (b) that the trustee be directed to pay the judgment at such time or times and in such manner as by this court shall be directed; (c) that the amount so paid by the trustee be charged against the beneficiary in the account of the trustee; and (d) for general relief.

It is contended by the appellant that there is no equity in this petition, in that, by the terms of the will, the testatrix intended to create a fund beyond the control of the beneficiary, the income only of which should be used for her personal maintenance and support during life, and not be taken in payment of debts contracted by her or through charges against her; that the property is bequeathed directly to the trustee, giving him title and possession; and that such trustee is directed to invest, manage, and control it, and pay the income to the beneficiary during life, but he is not authorized to pay it to her grantors nor assigns. It is also contended that the remedy, if any, could be enforced only by original bill.

Section 5575, How. Ann. St., provides: "When a trust is created to receive the rents and profits and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created shall be liable in equity to the claims of creditors of such person in the same manner as other personal property which cannot be reached by an execution at law." By the terms of the will by which the trust in this case was created, there is a direction that the surplus shall be paid to the beneficiary. The statute above quoted was taken verbatim from the New York statute; and in Williams v. Thorn, 70 N. Y. 270, and in Tolles v. Wood, 99 N. Y. 616, 1 N. E. 251, the points raised by the appellant here were

fully decided, and it was held that, where a judgment debtor is the beneficiary of a trust by which the trustee is required to receive and pay over to him the income of the trust estate, an action may be maintained by the judgment creditor after the return of an execution unsatisfied, to reach the surplus income beyond what is necessary for the suitable support and maintenance of the beneficiary; that the right of the creditor to maintain such an action exists as well where the trust estate is personal as where it is real property; that the remedy of the creditor is not confined to the surplus which has accrued and accumulated in the hands of the trustee, but that the court may determine what may be a reasonable allowance for the beneficiary, and direct the application of any future surplus to the payment of the judgment until it is fully paid; that the statute exempting from the operation of creditors' bills trust funds when the trust has been created by or the trust fund has proceeded from some other than the defendant is not in conflict with the statute providing that the surplus income of the trust estate shall be liable in equity to the claims of creditors; that the two statutes, which are similar to our own sections 6614 and 5575, are to be construed together, and are intended to exempt the principal fund and the beneficial interest of the beneficiary in the income only to the extent of a fair support out of the trust estate. In Tolles v. Wood, the court held, further, that the creditor of such a beneficiary acquires a lien upon the accrued and unexpended surplus income arising from such fund, superior to the claims of general creditors or assignees of the beneficiary, by the commencement of an action in equity to reach and appropriate it to the satisfaction of his judgment. In Nichols v. Levy, 5 Wall. 441, Mr. Justice Swayne, delivering the opinion of the court, said: "It is a settled rule of law that the cestui que trust, whatever it may be, is liable for the payment of its debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary, and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to any other persons, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." The rule laid down in Perry, Trusts, § 815, and in Pom. Eq. Jur. § 989, states that the cestui que trust cannot hold and enjoy his interest entirely free from the claims of creditors, and that, in the absence of special circumstances, the creditor can attach the beneficiary's interest in the hands of the trustee.

This application is made simply to reach the smaller part of this surplus fund, and we think it sets up equitable grounds for the relief sought. No personal decree is asked against either party, nor is a lien sought to be established upon any property. The relief asked is a direction to the trustee to pay the claim out of the surplus fund, and that is entirely within the province of the court having jurisdiction of the trust estate. We think it is proper to present the case by petition rather than by original bill. In Bank v. Byles, 67 Mich. 305, 34 N. W. 702, in disposing of a similar question, it was said: "There is really no reason why the whole grievance may not as well be heard upon the petition as upon a bill. The facts upon which relief is based and asked and information desired can as well be stated and presented in the petition as in a bill. The rights of all the parties can as well be protected in the one as in the other." We think the court below properly overruled the demurrer, and the proceeding will be remanded to the court below, for further action there. The other justices concurred.

COOK v. HAMMOND.

(Fed. Cas. No. 3,159, 4 Mason, 467.)

Circuit Court, D. Massachusetts. Oct. Term, 1827.

This was a writ of entry. The parties agreed upon a statement of facts as follows: "The above action is brought by the plaintiff [Horatio G. Cook] to recover possession of certain undivided portions of the lands and tenements described in the writs against the defendant [Samuel Hammond], who claims to hold possession under Eli Leavitt and Jane his wife in her right, who dispute the plaintiff's title; and the following are the facts agreed upon between the parties: In the year 1770 Royal Tyler died seised in fee of the demanded premises, leaving three children, viz. John S. Tyler, Royal Tyler, and Jane Tyler. The eldest son relinquished his right to a double share according to the existing law; and the three became seised in fee as tenants in common, each of one undivided third part. Jane afterwards intermarried with David Cook, by whom she had two children, viz. the plaintiff, and Mary Tyler Cook, his sister. Jane Cook died in 1786, so seised of such third part, leaving those two children and her husband, whereby he became seised as tenant by the curtesy. Mary, the daughter, died during his life, in 1809. David Cook, after 1786, married a second wife, by whom he had three children, viz. Charles, Jane, wife of the said Leavitt, and Royal. David Cook died in 1823, he or his assigns continuing until that time in possession under his title, as tenant by the curtesy. It is considered immaterial, for the purpose of the present inquiry, whether Mary Cook, the sister of the plaintiff, left issue capable of inheriting. It being agreed, that she shall be considered as having died without any; leaving any question, that could arise, if there be such, to be settled between them and the plaintiff or defendant, as there may be occasion. Upon this statement two questions are presented to the court: (1) Whether the demanded premises, of which Jane Tyler died seised, belong exclusively to the plaintiff, or to him and the defendant, according to their respective proportions, as tenants in common. (2) And if to them, as tenants in common, then, whether the plaintiff is entitled to a double share of his mother's estate; or whether he is only entitled to one moiety by inheritance from her, and saving any further right to the inheritance of his sister or father."

C. G. Loring for plaintiff.

C. S. Daveis, for defendant.

STORY, Circuit Justice. Upon the very elaborate and learned arguments at the bar, every matter has been brought before the court, that can assist in forming its judgment. I should have been glad, as this is a point of local law, to have found the principal question adjudicated in our own state tribunals, so that my duty might have been merely to follow their decision. Unfortunately, no such case is known to exist, and it must therefore here receive an original determination. The rules of the common law have been fully stated at the bar, and indeed admit, upon the authorities, of no serious controversy. Where the estate descended is a present estate in fee, no person can inherit it, who cannot, at the time of the descent cast, make himself heir of the person last in the actual seisin thereof; that is, as the old law states it, "seisina facit stipitem." But of estates in expectancy, as reversions and remainders, there can be no actual seisin during the existence of the particular estate of freehold; and consequently there cannot be any mesne actual seisin, which, of itself, shall turn the descent, so as to make any mesne reversioner or remainder-man a new stock of descent, whereby his heir, who is not the heir of the person last actually seised of the estate, may inherit. The rule, therefore, as to reversions and remainders, expectant upon estates in freehold, is, that unless some thing is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seised in fee and created the particular estate, or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. It is no matter in how many persons the reversion or remainder may, in the intermediate period, have vested by descent; they do not, of course, form a new stock of inheritance. The law looks only to the heir of the donor or first purchaser. But while the estate is thus in expectancy, the mesne heir, in whom the reversion or remainder vests, may do acts, which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new stock. Thus, he may by a grant, or devise of it, or charge upon it, appropriate it to himself, and change the course of the descent. In like manner, it may be taken in execution for the debt of such mesne remainder-man or reversioner during his life, and this, in the same manner, intercepts the descents. But if no such acts be done, and the reversion or remainder continues in a course of devolution by descent, the heir of the first donor or purchaser will be entitled to the whole as his inheritance, although he may be a stranger to all the mesne reversioners and remainder-men, through whom it has devolved. These doctrines are fully and learnedly explained by Mr. Watkins in his Essay on Descents, and are so well known, that it seems unnecessary to give to them any illustrative commentary. Watk. Desc. 137 (110), 148 (116), 153 (120). Now the operation of this doctrine in respect to estates in fee in possession, which are subject to dower and tenancy by the curtesy, is very important.

In the former case, though the heir at law may obtain an actual seisin by entry into the whole estate, yet, by the assignment of dower, that seisin, as to the third part assigned as dower, is defeated ab initio; for the dowress is in of the seisin of her husband, and her estate is but a continuance of this seisin. The same principle is true of tenant by the curtesy. It is even stronger, for the law vests the estate by curtesy in the husband without any assignment, and even without any entry, if the wife were already in possession, his estate being initiate immediately on issue had, and consummate by the death of his wife. So that there is no chasm between the death of the wife and his possession, as there is in case of the death of the husband and the assignment of dower to the wife, in which there can be a mesne seisin. Watk. Desc. (82) 104. Nothing, therefore, but a reversion passes in such case to the heir. But it is a misnomer to call it a case of suspended descent. In such case of curtesy, the reversion descends and vests absolutely in the heir. He may sell it, incumber it, devise it; and it is subject to execution as part of his property during his life. The descent to the heir is not suspended, but the actual seisin of the fee is not in him, since by law the actual seisin is in the tenant by the curtesy.

Applying these principles to the case now in judgment, it is obvious, that when Jane Tyler, the wife of David Cook, died in 1786, seised of the premises, her husband became tenant thereof by the curtesy, and consequently the reversion thereof alone descended to her children, viz. to Horatio G. Cook (the plaintiff) and Mary T. Cook. By the act of descents of 1783, c. 36 [supra], the eldest son was entitled to two shares, and this right, if at all, took effect at the time of the descent cast; and it is just as applicable to the case of a reversion or remainder as to a present estate in fee. Nothing has since taken place to devest the title of the plaintiff by descent from his mother, and as the estate has fallen into possession by the death of his father, his reversion has become a present estate to two thirds of the premises in controversy. The great question turns upon the third of the reversion belonging to Mary T. Cook. She died in 1809, and if without issue, and it had been a present estate in fee, her father would have inherited it as her heir. It was but a reversion, and if the rule of the common law be in force here, the plaintiff, being at the time of the death of the tenant by the curtesy the sole heir of his mother, is entitled to take the whole estate. Have our laws abrogated the rule of the common law? By the colonial acts of 1641 and 1649 it was ordered, that "when the husband or parents die intestate, the county court &c. shall have power &c. to divide and assign to the children, or other heirs, their several parts and portions out of the said estate; provided the eldest son shall have a double portion; and where there are no sons, the daughters shall inherit as copartners, unless the court, upon just cause alleged, shall otherwise determine." There is nothing in this language, which points to any particular kind of estates, and the language is sufficiently broad to cover all kinds. By the provincial act of 1692 (4 W. & M. c. 8) it was enacted, "that every person lawfully seised of any lands, tenements, or hereditaments within this province, in his own proper right in fee simple, shall have power to give, dispose, and devise the same," &c. &c.; and if not so disposed of, then "the same shall be subject to a division with his personal estate, and be alike distributed according to the rules hereinafter expressed for intestate estates." Here, again, there is no language discriminating between the various kinds of estates, whether present or in expectancy, unless some stress can be laid on the words "lawfully seised of any lands," &c. the force and effect of which will come under consideration in construing the act of descents, under which the present question arises. The act of 1783 (chapter 36) enacts, that "when any person shall die seised of any lands, tenements, or hereditaments, not by him devised, the same shall descend in equal shares to and among his children, &c., except the eldest son," &c. &c. Another clause declares, that "the real estate shall stand chargeable with all the debts of the deceased over and above what the personal estate shall be sufficient to pay," &c. And throughout the act, there is a studious silence as to any differences in the course of descent of any estates capable of descending. Then came the act of descents of 1805 (chapter 90), which was drawn by Chief Justice Parsons, and after a full explanation of his views, with his permission perused by me, then being a member of the legislature, and with what little aid and co-operation I could give it, passed into a law. That act provides, that "when any person shall die seised of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, the same shall descend in equal shares to his children, &c. &c.; and when the intestate shall leave no issue, the same shall descend to his father," &c. &c. Mary T. Cook died in 1809, and consequently this act regulates the descent of her estate.

The present case is obviously within the words of the act. No reasonable doubt can be entertained, that a reversion is a "right" or "interest" in lands. In truth, it is included under the denomination even of "land," and a grant of land will convey a reversion. Com. Dig. "Estates," B, 12. A fortiori, it is included under the description of "tenement" and "hereditament," for these are words of more extensive import, nomina generalissima. Com. Dig. "Grant," E; Shep. Touch. 88; 1 Inst. 6a. The language

of the act is, "when any person shall die seised." But it is not a just construction of the act, to interpret this as intending an actual seisin. Lord Coke says (1 Inst. 15 a), "seisin is common, as well to the English as French, and signifies, in the common law, possession." Com. Dig. "Seisin," A, 1. It may be either a seisin in law, or a seisin in fact. Now, without adverting to what constituted, in the ancient law, a seisin in law, as contradistinguished from a seisin in deed, it is sufficient to say, that for centuries the language of the law has been, that a reversioner is "seised" of the reversion, although dependent upon an estate for life. Thus, in Plowden, 191, it was held by the court, that, where a reversion is dependent upon an estate for life, the reversioner, in pleading, may state, that he is seised of the reversion. Watk. Desc. c. 1, §§ 1 (27), 39–44: 2 Bl. Comm. 127. By this no more is meant, than that he has a fixed vested right of future enjoyment in it. If a sense, at least as large as this, were not given to the term "seised," it would follow, that the descent of reversions and remainders vested by purchase in the ancestor, and even of reversions vested in the original donor of the particular estate, would be wholly unprovided for, both by the provincial acts of descents of 1692, and the state act of 1783. Cases of this sort must have been innumerable, and yet no doubt ever was entertained, that the descent of such remainders and reversions was provided for by these acts. My opinion is, however, that the word "seised," used in all these acts, has a broader signification, and such as belongs to it in common parlance. It is equivalent to "owning;" and "seisin" is equivalent to "ownership." My reason is, that otherwise none of these acts would regulate the descents of estates, whereof the ancestor, at the time of his death, was disseised; and yet, from the first existence of these acts, up to the present day, it has always been understood, that the descent of estates from the disseisee, was to the same heirs as would inherit, if he died in the actual seisin. The language of the provincial act of 1692 is, "any person lawfully seised;" but that of the acts of 1783 and 1805 is, any person who "shall die seised." Upon a descent, therefore, cast from an ancestor, who was disseised in his life-time, and died disseised, no title would pass to his heirs under these acts (but pass to the heir at common law), if we did not interpret the word "seised" as equivalent to "owning" or "entitled to;" and this, as far as my knowledge extends, has been the uniform interpretation. If, however, any doubt whatsoever could remain on this point, it is put completely at rest by the supplementary clause in the act of 1805; "or of any right thereto, or entitled to any interest therein." And as one object of that act was to clear away latent ambiguities, and to affirm the settled construction upon the former acts, these words seem appropriate for the very purpose under consideration. I confess I should not have entertained any doubt as to the true construction, without them. There are other parts of these acts, which satisfy my mind, that the legislature intended, by them, to provide effectually for the descent of all the real estate of the intestate. The phrase, "real estate," occurs frequently in the acts, as of the same import with the words, "lands, tenements, and hereditaments;" and the provision, making the "real estate" of the intestate liable to his debts, was evidently meant to be co-extensive with the property, which would pass by descent. If the legislature, by these acts, meant to provide a system of descents for all the real estate, which is vested in the intestate at the time of his death, and refer to him alone as the stock of inheritance as to such real estate, upon what ground can resort be had to the common law for a rule of descent in the present case. The legislature has nowhere named reversions or remainders, as entitled to a distinct course of descent. It has nowhere stated, that the heir must make himself heir, when the estate falls into possession of the original reversioner, or of the purchaser of such remainder. It has been perfectly silent on this subject; and has uniformly looked to the last intestate, as the stock of descent of the real estate vested in him; and in one or two excepted cases only (as of a child dying under age, &c.) has made a special provision, interfering with the general policy of the acts. These very exceptions are strong to show, that no others were intended. If the argument at the bar can be maintained, then this is a case wholly unprovided for by any statute, and the descent is to be regulated by the canons of the common law. But if reversions and remainders are out of the statute, so far as respects the stock of inheritance, what ground is there to stop here, and not apply the same rule to the heirship? If the statute meant to leave the rule of the common law in force, as to reversions and remainders, then the heir at common law, that is, in case of several children, the eldest son, is entitled to take the whole. Upon what principle can we apply our canons of descent to reversions and remainders to ascertain who are the heirs, and, at the same time, refuse the like application as to who is the ancestor, or stock of inheritance? If our statutes do not contemplate cases of reversions and remainders, then such cases are to be governed wholly and exclusively by the common law. Such a doctrine has not, as I recollect, been asserted.

The present question must have often occurred, in many cases of dower, and in still more numerous cases of tenancy by the curtesy. Yet hitherto there has been a total silence among the profession on the subject. There has not been any case within the memory or tradition of any man, in which such a

right has been asserted or acquiesced in, as the plaintiff now claims. Judge Trowbridge, in his reading on the statute of distributions (Precedents, Declar., Ed. 1802, p. 290) of 1692, makes no allusion to any such doctrine; and yet if it had been stirred, it could scarcely have escaped his learned mind, and must have constituted a very important part of his reading. I have a note of a very memorable case (Ames v. Gay), in which the question must have arisen, and must have been decided, if there had been any such doctrine then afloat. My note states, that the case was an ejectment decided on a special verdict in 1749, and that the facts were as follows: One Fisher was seised of the estate in question, and devised the same to his wife, during her widowhood, remainder in fee to his daughter Mary, who was the wife of the demandant. The testator died, and afterwards, during the life of Fisher's widow, Mary, the devisee, died, leaving an only child, Fisher Ames, who afterwards died without issue, and intestate. Afterwards the widow of Fisher died, and thereupon the demandant brought the suit, as heir of his son, Fisher Ames. The defendant (Gay) claimed the estate as husband of the niece of Mary, the wife of the demandant. The court, after argument, gave judgment for the demandant. I have understood, that this was the first cause in which the point was decided, that the father could inherit from the son, under the provincial act of 1692. But it presents the identical question now before the court, and the father could not have recovered, if the plaintiff's argument is now well founded. The case of Williams v. Amory, 14 Mass. 20, seems to have proceeded upon the ground, that a remainder-man, who died before the expiration of the tenancy for life, was a proper stock of descent. In that case the intestate took by purchase, and therefore was at common law a proper stock of inheritance, and as he left only one child, the descent was the same as at the common law. The court, however, took no notice of the case in this particular view. But the court there decided that remainders and reversions were, under our laws, liable to be taken in execution for the debts of the reversioner and remainder-man, and comprehended as "real estate" of the debtor under our statute of executions of 1783, c. 57. The cause of Whitney v. Whitney, 14 Mass. 88, is more in point. There the court held, that a reversion in the hands of a mesne reversioner was, on his death, to be considered as assets in the hands of his administrator for the payment of his debts, notwithstanding the tenancy for life did not expire until after his death. The reasoning of the court proceeds upon the admission of the doctrine of the common law; and that it had been changed by our statutes. If the reversion, notwithstanding the death of the party, before the life estate falls in, be assets, because it constitutes a part of the "real estate" of the mesne reversioner, it seems to me, that for the same reason, it must be liable to distribution among his heirs.

Upon the whole, my opinion on this question is, that the common law rule, as to descents of reversions and remainders, has been altered by our statutes, and is not in force here; and that, by our statutes, reversions and remainders, of which the intestate is the owner at the time of his death, are to be distributed among his heirs in the same manner as estates in possession. In Connecticut the same question has arisen under the statute of descents of that state, which contains provisions, in substance, like ours; and after very elaborate arguments, the court came to the same results, to which my own judgment has been led.

There is a point, which has been suggested at the argument, upon which it may be well to dwell for a moment, as it fortifies the conclusion already expressed by the court, and leads adverse to the right of the demandant to recover the third of the reversion, which devolved on his sister Mary. It is this, that as upon her death, her right in the reversion, by our statutes, descended to her father, and vested in him as a mesne reversioner, and as he was then tenant for life, by the curtesy, of the whole premises, he became by operation of law, to this third part, seised in fee by the union of both estates. In other words, his estate for life, as to this third part, became merged in the reversion in fee, which devolved upon him. Lord Coke puts (1 Inst. 182b) several analogous cases. "If (says he) a man maketh a lease to two for their lives, and after granteth the reversion to one of them, the jointure is severed, and the reversion is executed for the one moiety, and for the other moiety there is tenant for life, the reversion in the grantee." So, "if lessee for life granteth his estate to him in the reversion, and to a stranger, the jointure is severed, and the reversion executed for the one moiety by the act of law." If I may be allowed to state a fact within my personal knowledge, I would add, that at an early period of my professional life, I put this very inquiry to Mr. Chief Justice Dana, in order to ascertain if the common law rule had ever been recognised here. His answer was, that he knew no distinction admitted in descents here, between estates in possession and in reversion. I refer to this merely to show that his extensive learning and practice had not led him to notice the existence of any distinction in this state.

Judgment for plaintiff, two thirds of the premises.

SLEGEL v. HERBINE et al.

Appeal of LAUER.

(23 Atl. 996, 148 Pa. St. 236.)

Supreme Court of Pennsylvania. March 28, 1892.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Suit by Sue J. Slegel, executrix of Joel Slegel, against Samuel G. Herbine and others, county commissioners of Berks county, with notice to Rebecca Lauer, executrix of William Rhoads, Sr., and John W. Rhoads, to obtain the cancellation of a deed. From a decree for plaintiff, Rebecca Lauer appeals. Affirmed.

The following is the opinion of Judge G. A. Endlich in the court below:

"Plaintiff is in possession of a strip of land 8 feet wide and 230 feet deep, in the city of Reading, adjoining on the south property of the estate of William Rhoads, Sr., deceased, which formerly belonged to the county of Berks, and was the site of the old county jail. On December 1, 1772, plaintiff's predecessor in title, George Fleisher, with Margaret, his wife, in consideration of the payment to them of seventeen pounds, lawful money of Pennsylvania, by indenture duly executed and acknowledged, and recorded in the recorder's office in Deed-Book B, vol. 2, p. 71, 'granted, bargained, sold, released, and confirmed unto Henry Reuthmeyer, David Bright, and Abraham Lincoln, commissioners of Berks county, and to their and each and every of their successors in the said office of commissioners, a certain piece or part of the said above mentioned and described lot, situate on the south side thereof, adjoining the prison lot and wall, containing in front on Callowhill street aforesaid, north and south, eight feet, and in length or depth, east and west, two hundred and thirty feet, to a twenty feet alley; together with the appurtenances. (Excepting and hereby reserving unto the said George Fleisher, his heirs and assigns, forever hereafter, the free liberty and use of the said hereby granted premises, and every part thereof, for an open yard, garden, or grass lot, with the rents, issues, and profits of the same, and every part thereof: provided, always, that the said George Fleisher, his heirs, executors, administrators, or assigns, keep no other gates or fences about the same except pale gates and fences two inches and a half apart and not to exceed four feet and a half in height.) To have and to hold the said piece or portion of ground hereby granted or mentioned or intended so to be, with the appurtenances (except before excepted), unto the said Henry Reuthmeyer, David Bright, and Abraham Lincoln, commissioners as aforesaid, and their successors in the said office; to and for the use, intent, and purposes following, that is to say: To be and remain forever hereafter unbuilt on, in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to the same wall.'

"By section 14 of the act of April 8, 1848 (P. L. pp. 399, 406, 407), the commissioners of Berks county were 'authorized, as soon after the removal of the prisoners then in jail from the said old jail to the (newly erected) Berks county prison, as to them shall appear expedient, to sell the old jail property in the city of Reading, consisting of the old jail buildings and the appurtenances, and a lot of ground, being on the corner of North Fifth and Washington streets, in the said city of Reading, and having sixty feet on said North Fifth street, and 230 feet on Washington street, and to assure and convey to the purchaser or purchasers the said property, by good and sufficient deed or deeds.' Under this statute the commissioners sold and conveyed the old jail property, with the appurtenances, to William Rhoads, Sr., the deed being dated April 2, 1849, and recorded in Deed-Book A, vol. 56, p. 232. About that time the property ceased to be used for the purpose of a county jail. The new prison is removed more than a mile from the old location.

"The object of the bill filed in this case is to obtain the cancellation of the instrument of December 1, 1772, the plaintiff alleging that she is anxious to sell the property of the testator, 'but is unable to do so at a proper and adequate price, for the reason that the said Rebecca Lauer and John W. Rhoads, defendants in this suit, insist upon and have made public that they are entitled to the rights and privileges of the county commissioners contained in said agreement of December 1, 1772, and thereby have prevented and still prevent a sale of said property for a proper price, to the great inconvenience and damage of your orator.' The bill names as defendants the present commissioners of Berks county and Rebecca Lauer, executrix of William Rhoads, Sr., deceased, and John W. Rhoads; the will of William Rhoads, Sr., deceased, giving the property to Rebecca Lauer and John W. Rhoads for life, with remainder to their children. The commissioners have demurred to the bill, while the remaining defendants have answered. By agreement of counsel representing the several parties, the demurrer and the bill and answer were set down for hearing and argued at the same time.

"As preliminary to the decision upon either submission, we shall have to declare our interpretation of the instrument of 1st December, 1772. It is, in form, a conveyance to the commissioners and their successors in office, i. e., as these boards were then regarded as corporations (Yankirk v. Clark, 16 Serg. & R. 286, 290), a grant of the fee (2 Bl. Comm. p. 109). Moreover, the

grant is of the land itself, subject to a conditional reservation (see Adams v. Valentine, 33 Fed. 1) of the use of the surface. There is therefore no room for the theory that the effect of the deed is to create an easement in favor of the grantees. An easement is a liberty, privilege, or advantage which one may have in the lands of another without profit. Big Mount. Improvement Co.'s Appeal, 54 Pa. St. 361, 369. It may be merely negative (4 Sharsw. & B. Lead. Cas. Real Prop. p. 125), and may be created by a covenant or agreement not to use land in a certain way (Id. p. 131); but it cannot be an estate or interest in the land itself, or a right to any part of it (Id. p. 121; Huff v. McCauley, 53 Pa. St. 206, 209; Grubb v. Grubb, 74 Pa. St. 25, 33). If any easement is created by this instrument, it is by the reservation, and in favor of the grantor. It seems clear that, had the grantor or his assigns undertaken to use the land in a manner different from that permitted by the reservation, coupled with the proviso, the grantees or their successors could, by ejectment, have ousted them altogether. See Bear v. Whisler, 7 Watts, 144. But ejectment does not lie to enforce an easement or privilege. Black's Lessee v. Hepburne, 2 Yeates, 331; Canal Co. v. Young, 1 Whart. 410, 424. In construing a deed, however, we are to look at it as a whole, so that no part of it may be rejected. Wager v. Wager, 1 Serg. & R. 374, 375. 'The premises of a deed are often expressed in general terms, admitting of various explanations in the habendum,' which 'may lessen, enlarge, explain, or qualify the premises, but not totally contradict them' (Id.); and for that purpose the court in that case interrogates the habendum and the declaration of uses. These, in the present instance, could not have the effect of reducing the grant of a fee in the premises to anything less than a fee, but they can explain the nature of that fee to be either an absolute or a base or qualified one. It must not be forgotten that such a fee is nevertheless a fee-simple, because it may last forever in a man and his heirs, the duration depending upon the concurrence of collateral circumstances which qualify and debase the purity of the grant. 2 Bl. Comm. p. 109. The qualification must be found in the instrument itself. Canal Co. v. Young, 1 Whart. 410; Kerlin v. Campbell, 15 Pa. St. 500. But no special or technical words are required to establish it. 2 Sharsw. & B. Lead. Cas. Real Prop. p. 23. 'The construction of a deed, as to its operation and effect,' says Kent, speaking of this very matter, 'will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case.' 4 Kent, Comm. p. 132. What is needed is that the deed on its face contain a reservation or declare a specific purpose for which the land was conveyed, and from which the reservation may be implied. Caton, J., in Adams v. Logan Co., 11 Ill. 336. Of course, the mere expression of a purpose will not of and by itself debase a fee. Thus a grant in fee-simple to county commissioners of land 'for the use of the inhabitants of Delaware county, to accommodate the public service of the county,' was held not to create a base fee (Kerlin v. Campbell, 15 Pa. St. 500); as also a grant to county commissioners and their successors in office of a tract of land, with a brick court-house thereon erected, 'in trust for the use of said county, in fee-simple,' the statute under which the purchase was made authorizing the acquisition of the property for the purpose of a court-house, jail, and offices for the safe-keeping of the records (Seebold v. Shitler, 34 Pa. St. 133). Similarly a devise of land to a religious body in fee 'there to build a meeting-house upon,' etc., was held to pass an unqualified estate (Griffitts v. Cope, 17 Pa. St. 96); as was also a grant to a congregation, 'for the benefit, use, and behoof of the poor of said * * * congregation, * * * forever, and for a place to erect a house of religious worship, for the use and service of said congregation, and, if occasion shall require, a place to bury their dead' (Brendle v. German Reformed Congregation, 33 Pa. St. 415).

"There are, however, about these cases, some features which must not be overlooked. In Kerlin v. Campbell, supra, the conveyance was absolute, and the matter relied on to debase the fee granted by it was contained in another instrument, to which the original grantor was not privy. Page 506. In Seebold v. Shitler, supra, the act of assembly authorizing the purchase required a conveyance to the commissioners of 'a full and sufficient deed in fee-simple.' The court says that 'no conveyance for a less estate, or for a limited fee, clogged and confined with conditions or qualifications of any sort, would have fulfilled the requirements of the legislature;' and 'any other construction would make the deed a fraud upon the citizens who erected the court-house, and upon the county that erected afterwards the county offices and the county jail, by a large expenditure of the county funds.' Page 137. But, further, it is apparent in all the cases cited that the purposes for which the grants were made were really all the purposes for which the grantees could lawfully hold real estate. Unless, therefore, the absurd position be assumed that a corporation can in no event take a fee-simple absolute, because its power to hold land is limited to the uses for which it is authorized to acquire and employ it, a declaration in the grant that it is conveyed for those uses cannot be deemed to import a limitation of the fee. Expressio eorum quæ tacite insunt nihil operatur. Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant. As was said in the case of Grif-

fitts v. Cope, supra, at page 100: 'The use to which the granting clause declares that this land is to be applied is of the character which the law requires, and is the most ordinary purpose for which religious societies require land. The presumption would therefore appear fair and obvious that by that declaration the devisor merely meant to make the grant lawful upon its face.' And in Brendle v. German Reformed Congregation, supra, at page 425: 'What, then, is the efficacy of the declaration that the congregation holds the land for the use of its poor, for a church, and for a burial ground? Nothing, except to show that they hold it for the purpose for which the law allows congregations to hold land; not to limit their own title, but to recognize the uses allowed by law.' It is at once apparent that the present case is wholly different, in that the purpose expressed in this grant is not one for which counties usually acquire a fee-simple in lands. What those purposes may lawfully be since the act of April 15, 1834, is set forth in the proviso to section 3, cl. 2, of that statute. 1 Brightly, Purd. Dig. p. 364, pl. 14. Before its enactment, the general power of county commissioners to take lands was confined to such as were bought in by them to secure the county debts, on process from the courts, or their own process, authorized by law, or mortgages given to secure the county debts. Vankirk v. Clark, 16 Serg. & R. 286, 290. That they might enter into a valid agreement with a property holder adjoining, e. g., a county prison, not to build against its walls, with a view to preventing the escape of prisoners while the building was used as a place for their confinement, seems scarcely doubtful. And, if they might do that by a mere agreement, they might, in order to be in position to insure the accomplishment of the purpose, do so by taking a fee in the property to be kept open for such purpose. But they could not take more; they could not make an investment of more than was required by the immediate and lawful object in view; that is to say, whilst they could take a fee, that fee must be determinable upon the cessation of the necessity or occasion of its acquisition and the possibility of serving the purpose of its creation. It is surely not unreasonable to suppose that this limitation upon the commissioners' powers, and the contingency that at some future time the use of their property as a jail should be abandoned, were in the minds of the parties to the deed of 1st December, 1772, and had some influence in fixing the consideration for the grant. The employment of the word 'forever' seems insignificant in this connection; for, as has been seen, the estate might continue forever, and so, in that case, would the purpose. On the other hand, a grant of an estate 'forever' may yet be but of a life-estate. 2 Bl. Comm. p. 107. Hence there is a peculiar propriety in applying to the parties' declaration of purpose the familiar principle of interpretation, expressum facit cessare tacitum. That declaration shows but one purpose, and shows it clearly. It was not to afford light, air, or access to the adjoining tenement, to add anything to it that was needful or convenient to its use and enjoyment, nor to increase the size of the plot upon which the prison stood, or to enhance its value, set off its architectural proportions, or protect it against fire. It was simply to serve the one declared object,—the hindrance of the escape of prisoners,—which the erection of walls contiguous to those of the prison would facilitate.

"In view of all the circumstances, there seems to arise from the express declaration of purpose a necessary implication of the exclusion of every other. It is a rule in the construction of a statute, pleading, contract, will, and other instrument, that what is clearly implied is as much a part of it as what is expressed. U. S. v. Babbitt, 1 Black, 61; Hanchett v. Weber, 17 Ill. App. 114. The instrument under consideration is, therefore, to be treated precisely as if it contained a declaration that the grant was for the purpose mentioned, and no other. But, where an estate is conveyed in fee for a specified purpose 'and no other,' the fee is a base fee, determinable upon the cessation of the use of the property for that purpose. Kirk v. King, 3 Pa. St. 436; Scheetz v. Fitzwater, 5 Pa. St. 126. It is scarcely needful to add that those decisions which relate to the construction of a deed as conveying an estate on condition subsequent, and deny that effect to a recital that the grant is upon a certain consideration, or to a collateral covenant (see Cook v. Trimble, 9 Watts, 15; Canal Co. v. Young, 1 Whart. 410; Perry v. Scott, 51 Pa. St. 119; First Methodist Episcopal Church v. Old Columbia Public Ground Co., 103 Pa. St. 608), are inapplicable. The purpose here is not recited as part of the consideration, nor is its observance collaterally covenanted. Nor is the estate here granted one upon condition. Although there is some confusion in decisions and text-books concerning these two species of estates, there is a radical distinction—and one, as we pointed out in the recent decision of this court in Schaeffer v. Messersmith, Com. Pl. Berks Co., No. 105, May term, 1890, well established in the jurisprudence of this state—between a fee determinable by limitation and an estate upon condition subsequent. 2 Sharsw. & B. Am. Cas. Real Prop. pp. 19, 20. Nor, again, does the case of Yeaton's Appeal, 105 Pa. St. 125, relied on by respondents, bear upon the question in hand. That was the case of an easement created by a covenant contained in a deed, in terms perpetual, not to build upon the north or east of the grantor's church building, excepting that, if the same should at any time cease to be used for that purpose, a wall might be built on the east side. This was a limitation appointed by the parties themselves upon the effect of the abandonment of the then use of the dominant tenement; and in restricting

the owner of the servient one to the terms of this limitation the supreme court in effect but applied the principle which we have applied to this case,—expressum facit cessare tacitum. Of course, upon the determination of a base fee, the property reverts to the grantor (2 Bl. Comm. pp. 109, 110) without any claim or act on his part, where it is determinable by limitation (Schaeffer v. Messersmith, supra). In the meanwhile the estate is out of him, and all that remains to him is the mere possibility of reverter. 4 Kent, Comm. p. 10. Yet this mere possibility is capable of transmission to his grantees, and will pass to them under a conveyance of the reversion. Scheetz v. Fitzwater, 5 Pa. St. 126.

"We have next to pass upon the questions raised by the demurrer and by the submission of the cause upon bill and answer.

"First. As to the demurrer. Taking up the grounds of demurrer as they stand upon the record, we find:

"(1) An allegation contained in the first and second grounds, in substance, that the suit ought to be against the county of Berks, and not against the commissioners individually. The act of April 15, 1834 (P. L. p. 537), provides in section 9 (1 Brightly, Purd. Dig. p. 364, pl. 18) that the titles to all and singular the court-houses, jails, prisons, and workhouses, together with the lots of land thereunto belonging or appertaining, as they now are or heretofore have been vested in the commissioners of the respective counties for the several use of the said counties, respectively, shall be, and they are hereby declared to be, vested in the respective counties, for the use of the people thereof, and for no other use; and section 3 of the same statute (1 Brightly, Purd. Dig. p. 364, pl. 13) confers upon the several counties capacity, as bodies corporate, to sue and be sued as such by the corporate name. Whilst, as a general rule, land cannot be appurtenant to land (Grubb v. Guilford, 4 Watts, 223, 244), yet it may be made so by the intent and acts of the parties (Id.; Grubb v. Grubb, 74 Pa. St. 25, 33). The use of this strip of land permitted by the deed of 1st December, 1772, indicates such an intention, at least sufficiently to permit it to be regarded as an appurtenance to the jail property within the spirit of the act of 1834, and, as such, to the extent of the estate held by the commissioners to have thereby become vested in the county of Berks. This suit, therefore, under the decision of Wilson v. Commissioners, 7 Watts & S. 197, should have been brought against the county. But counsel for plaintiff and for the demurrants have agreed that, in event of the court's so holding, the bill should be amended by substituting the county of Berks as defendant in place of the commissioners named. Accordingly we shall treat the bill as properly brought against the county, and the formal amendment may be made hereafter. The other defendants are not thereby prejudiced. Having answered to the merits, the objection could not, it would seem, be now made by them (see Glover v. Wilson, 6 Pa. St. 290, 292; Fritz v. Commissioners, 17 Pa. St. 130, 134, 135), and, besides, 'if the misjoinder is of parties as defendants, those only can demur who are improperly joined' (Story, Eq. Pl. § 544).

"(2) The next ground of demurrer is that the interests of the defendants are not identical, but in conflict, and therefore they should not be joined in this proceeding. This assertion is based upon a misconception of the effect of the instrument of 1st December, 1772. There cannot be any question of conflicting interests between these defendants.

"(3) It is next asserted that this court has no jurisdiction to declare null and void the deed of 1st December, 1772, inasmuch as the same confers substantial rights upon the county of Berks, or its grantee, and the title of said premises depends upon the same. What was the nature and extent of these rights, and what the character of the title, has already been declared. It is only necessary in this connection to examine into the jurisdiction of this court to grant the relief prayed for. The particular form of equity jurisdiction here invoked is that which is exercised to remove clouds upon title; the relief in such cases being granted on the principle quia timet; that is, that the deed or other instrument constituting the cloud may be used injuriously, or vexatiously embarrass or affect the plaintiff's title to real estate. 3 Pom. Eq. Jur. § 1398. The existence of this as an independent source or head of jurisdiction in the courts of this state, not requiring any accompaniment of fraud, accident, mistake, trust, or account, or any other basis of equitable intervention, is abundantly established. Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540; Stewart's Appeal, 78 Pa. St. 88; Wilson v. Getty, 57 Pa. St. 266; Eckman v. Eckman, 55 Pa. St. 269, 273; Kennedy v. Kennedy, 43 Pa. St. 413, 417. The rules as to the status of the plaintiff to invoke the exercise of this jurisdiction, as laid down in 3 Pom. Eq. Jur. § 1399, note 4, p. 36, approved in Dull's Appeal, supra, at pages 517, 518, 113 Pa. St., and page 543, 6 Atl., are as follows: 'When the estate or interest to be protected is equitable, the jurisdiction should be exercised, whether the plaintiff is in or out of possession; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment under ordinary circumstances; but when he is in possession, and thus unable to obtain any adequate legal relief, he may resort to equity.' The occasions for and the mode of the exercise of the jurisdiction are stated to be the following: 'Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach

or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course or proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice or the rights of the parties may require.' Martin v. Graves, 5 Allen, 601, approved in Stewart's Appeal, supra, at page 96, and Dull's Appeal, supra, at page 516, 113 Pa. St., and page 542, 6 Atl. And again: 'If a case is made out which will justify the court in declaring a contract at an end, it will in general be ordered to be delivered up to be canceled.' Wilson v. Getty, supra, at page 270. It is objected, however, that 'the proper construction of a deed is not a subject of equitable jurisdiction.' Grubb's Appeal, 90 Pa. St. 228, 233. No doubt there is not in this state, as there is in some others, any special jurisdiction conferred upon the courts of equity by reason of which they may be called upon to declare the construction of a deed or will or other instrument; nor, of course, will the mere fact that the proper construction of such is in dispute confer chancery jurisdiction, in the absence of some other recognized basis of equitable intervention. But it will scarcely be pretended that where a party has no legal remedy whereby to protect his property against the assertion of an unfounded or expired claim the established equity jurisdiction is ousted by the mere fact that incidentally it will be necessary to put a construction upon a written instrument. Such a doctrine would practically amount to a denial of the jurisdiction itself. Again, it is urged upon us that a court of equity has no jurisdiction to settle a disputed legal right to land on a bill in equity filed by the party in possession, averring that a multiplicity of suits at law may result to redress threatened trespasses. Washburn's Appeal, 105 Pa. St. 480. Of course not; but that is not this case. In actions respecting real property, if there be no equitable ground of relief involved, the rights of the parties must be determined at law; the interference of equity in such a case resting on the principle of a clear right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented, and the party contesting that right, in the first instance dependent upon conflicting proofs, being entitled to have them passed upon by a jury. Id. A very different case is presented when the intervention of the court is asked upon a recognized ground of equitable jurisdiction; when the rights of the parties result from an undisputed written instrument, aided by facts that are admitted; when the injury complained of, arising from conceded acts, is partly subsisting and actual and partly anticipated, and of such a character as to afford no redress at law. No doubt, if the plaintiff were to proceed to build upon the strip of land in dispute, it is possible that a suit at law would be instituted against him in which his rights would eventually be passed upon. But it is equally possible that no such suit would be brought, at least for a period of years. In the meanwhile, the title, not merely the possession, would remain doubtful and unmarketable. But the owner of property has a right, not only to use it, but to sell it; and in that right, incapable of being enforced in any legal action he can institute, he is entitled to be protected. This ground of demurrer must therefore fail.

"(4) The last ground is that the plaintiff is not entitled to relief in this proceeding under the premises, as her predecessor reserved for himself and his assigns certain rights, which it is not averred have been interfered with. What has already been said sufficiently disposed of this ground of demurrer, which cannot be sustained.

"Second. As to the answer. But little remains to be said in passing upon the submission on bill and answer. The allegation of the respondents is, in substance, that the instrument of 1st December, 1772, invested the grantees therein with an indefeasible right, which, by the deed of 2d April, 1849, passed to William Rhoads, Sr., as appurtenant to the old jail property. The estate of the county of Berks, under the instrument of 1st December, 1772, being a base fee, whether principal or appurtenant to the old jail property, it could pass to its vendee nothing more than it had, i. e., as to this strip of ground, nothing, if the estate had terminated before the date of the conveyance by an abandonment of the purposes of the grant; or an estate determinable upon such abandonment, if prior to it in date. 'If the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer, and this is founded upon the sound maxim of the common law that nemo potest plus juris in alium transferre quam ipse habet.' 4 Kent, Comm. p. 10. Indeed, it is not clear how, under the act of assembly authorizing the sale and conveyance under which respondents claim, anything more could pass. If it were conceded that the estate of the county, under the deed of 1st December, 1772, was a fee-simple absolute, it would still be true that the statute authorized but the sale of 'what is now called the "Old Jail Property" in the city of Reading, consisting of the old jail buildings and the appurtenances and a lot of ground, being the corner of North Fifth and Washington streets, in the said city of Reading, and having 60 feet on said North Fifth Street, and 230 feet on Washington street.' It was held in Seebold v. Shitler, 34 Pa. St. 133, 137, that a deed from a private grantor to the county must be deemed to convey what the statute required. It would seem but a corollary to this rule that a deed from the county to a private grantee cannot convey more than the statute authorized. Upon the bill and answer it is clear that the respondents

have no interest in or right over the eight feet wide strip of ground to the north of their tenement.

"In the consideration of this case it has been assumed (nor was it questioned upon the argument) that the conveyances by plaintiff's predecessors in title, during the continuance of the estate granted by the deed of December 1, 1772, included the reversion of this strip of land. The usual form of conveyances in fee-simple contains such a grant, and it may be supposed that those forming the chain of plaintiff's title were not exceptional in this respect. Yet the fact ought to be made to appear in this record, and for that purpose leave will be given to plaintiff to amend her bill by proper averments. That done, plaintiff will be entitled to the relief prayed for, and counsel will prepare and submit the necessary decrees in accordance with the views expressed in this opinion."

J. H. Jacobs, H. P. Keiser, and J. H. Zweizig, for appellant. E. B. Wiegand, for appellee.

PER CURIAM. The opinion of the learned judge of the court below is so full and satisfactory that we affirm the decree for the reasons there given by him. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

HUNT et al. v. HALL.

(37 Me. 363.)

Supreme Judicial Court of Maine. 1853.

Fox & Simmons, in support of exceptions. Mr. Barrows and W. P. Fessenden, contra.

APPLETON, J. This is an action of the case in the nature of waste, and is brought under the provisions of Rev. St. c. 129, §§ 4, 5.

Ephriam Hunt, under whom the plaintiffs derive title, by his last will gave a life estate in the premises in which waste is alleged to have been committed, to his wife, and after her decease, directed that equal division should be made among all his children, and the heirs of such as might then be deceased, of all his property, both real and personal. The tenant for life is still living, and the defendant represents her estate.

The rights of the parties depend upon the nature of the estate which was devised by the will of Ephriam Hunt, which was in the words following: "After the decease of my dear wife, my will is that my executor hereafter named cause an equal division to be made among all my children and the heirs of such as may then be deceased." The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his share of the estate, and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided "among his children and the heirs of such as may then be deceased." By the terms of the will, the estate is not to vest till after the death of the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate.

"Contingent or executory remainders, (whereby no present interest passes,) are when the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious or uncertain event; so that the particular estate may chance to be determined and the remainder never take effect." 2 Bl. Comm. 169. In Olney v. Hull, 21 Pick. 311, the words of the devise were almost identical with those in the case now under consideration, and the court held that until the death of the widow, it was uncertain, who would then be alive to take, and that therefore no estate vested in any one before that event happened. Where an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive. 2 Cruise, Dig. tit. 16, c. 1, § 21, "Remainder." So where one devised lands to his daughter H. and her husband, for their respective lives, and after their death to the heirs of H., it was held that the remainder was contingent until the death of H., and then vested in the persons who were then heirs. Richardson v. Wheatland, 7 Mete. (Mass.) 169; Sisson v. Seabury, 1 Sumn. 235, Fed. Cas. No. 12,913.

It is obvious that by the terms of the will, the plaintiffs took a contingent and not a vested remainder. They are not within the provisions of Rev. St. c. 129, and consequently are not entitled to maintain this action.

Exceptions overruled. Nonsuit confirmed.

SHEPLEY, C. J., and TENNEY, J., concurred.

HOVEY v. NELLIS et al.

LICHT v. SAME.

(57 N. W. 255, 98 Mich. 374.)

Supreme Court of Michigan. Jan. 9, 1894.

Appeal from circuit court, Wayne county, in chancery; George Gartner, Judge.

Two actions—one by Frank D. Hovey against Caroline Nellis and Mary M. Beck, and the other by Frank J. Licht against the same defendants—to quiet title to certain real estate. From a decree for plaintiff in each case, defendants appeal. Affirmed.

Gray & Gray, (W. J. Stuart, of counsel,) for appellant Caroline Nellis. Bowen, Douglas & Whiting, (W. J. Stuart, of counsel,) for appellant Mary M. Beck. O. E. Angstman, (Clark & Pearl, of counsel,) for appellee.

GRANT, J. The controversies in these two suits are identical, and are governed by the same facts. In this opinion we will refer only to the case of Hovey v. Nellis. The bill is filed to quiet the title to outlot No. 4 of the L. Moran farm in the city of Detroit. This farm was a narrow strip of land a few hundred feet wide, and extending back from the Detroit river about three miles. It was divided into nine lots, numbered from 1 to 9, inclusive. Lot No. 9 lay furthest from the river, and included 60.53 acres. It was subsequently subdivided into 19 outlots, numbered from 1 to 19, inclusive. The controversy in this case relates to outlot No. 4. Louis Moran, the owner of the entire farm, made his will in 1825, and died in 1829. He left, surviving, a widow and several children. He had made certain deeds of gift to his other children, aside from his son Louis, which he recognized in his will. All his real estate not deeded to his other children he devised as follows: (1) To his wife, Katherine, for life. (2) To his son Louis for life, charged with the support of one of the testator's daughters. (3) To his daughter-in-law Maria, wife of his son Louis, during widowhood. (4) "The remainder of my said real estate I give and devise to the children of my said son Louis Moran, and, if my said son Louis shall die leaving no children, then to my heirs according to law." Complainant claims by purchase through mesne conveyance from the devisees of Louis Moran, Sr. The defendants claim as heirs of said Louis Moran, Sr. It is conceded that the devise to Maria is void under the statute, but that it does not affect the validity of the remainder of the will. Louis Moran, Jr., had three children,—the defendant Caroline Nellis, Octavia M. Sylvester, and James L. Moran. Mrs. Sylvester died in November, 1861, leaving one child,—the defendant Mary M. Beck. James L. Moran is dead, but the date of his death is unknown. He had one child, who died in May, 1886. In 1845, Katherine Moran, the widow, and Louis Moran, Jr., and his wife, conveyed by deed all their interest in the land to the three children of Louis Moran, who were then minors. One J. B. Vallee was duly appointed their guardian. In 1847 the guardian filed a petition in the circuit court for the county of Wayne in chancery, praying leave to sell their real estate under the provisions of the statute. The proceedings taken thereunder were regular, and on November 16, 1849, pursuant to the decree of the court, a deed was duly executed by the guardian, conveying the land in question to John A. Damm and Joseph Grones, from whom complainant derives his title. Louis Moran, Jr., died June 20, 1869, leaving as heirs his two children, James L. Moran and Caroline Nellis, and his grandchild Mary M. Beck. December 11, 1871, Caroline Nellis brought suit in ejectment against Jacob Brown to recover possession of "the undivided half of lot 4 of the Louis Moran farm." No proceeding has ever been taken in this suit other than to file declaration, and to file proof of alleged service thereof upon Brown. By mistake the land in the deed to Damm and Grones was erroneously described as outlet 5 instead of outlet 4. It is conceded by the defendants that this was an error apparent upon the record, and corrects itself. Complainant claims that, at the time of the deed to Damm and Grones, the title of this land was vested in the children of Louis Moran, Jr., and that, the proceeding in chancery to sell being regular, Damm and Grones became vested by the deed to them of the entire title in fee simple. He also claims that, if this be not so, still he has obtained title by exclusive and adverse possession for more than 20 years. The defendants insist that the only estate held by these children at the time of the guardian's deed was a contingent remainder, and not a vested remainder, and that, while Louis Moran, Jr., lived, it was uncertain whether he would leave any children, and therefore it was uncertain to whom the property would pass. They also insist that the ejectment suit brought by defendant Nellis intercepted the running of the statute of limitations. It is further insisted, on behalf of defendant Nellis, that, the mother of defendant Mrs. Beck having died prior to the death of Louis, Jr., she (Mrs. Beck) took no interest in the reversionary estate, and that the children of Louis surviving him, and not their issue, should take. On the contrary, it is insisted, on behalf of Mrs. Beck, that she inherited the one-third which her mother would have inherited, to take effect upon the termination of the life estates. At the date of the will, and also at the death of Louis Moran, Sr., his son Louis had no children. James L. was born in 1832, Caroline in 1838, and Octavia in 1842. Defendant Brown purchased the land in 1867. The following year he took actual possession of the land under his deed. The proofs established an actual, hostile, open, and notorious adverse possession for more

than 20 years previous to the bringing of this suit. This is sufficient to establish in him a good title, unless the ejectment suit above mentioned prevents.

1. It has been the policy of the courts to hold these estates vested at the earliest possible moment. Chancellor Kent states the rule as follows: "No remainder will be construed to be contingent which may, consistently with the intention, be deemed vested." 4 Kent, Comm. 203; McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652. When Louis Moran, Sr., made his will, his son Louis had no children. He had divided the balance of his property among his other children in anticipation of death. Manifestly, he intended that the property covered by the will should go to the issue of Louis, Jr., if he should have any. The contingency he desired to provide against was the death of his son without having had any children. It is unreasonable to say that the testator intended to cut off the direct heirs of his son Louis, should Louis' children die before he did, leaving issue. There is nothing in the provision of this will from which it can be inferred that he intended to divert the estate, in any event, from the direct heirs of the children of Louis, Jr. Our own statute declares when estates are vested, and when contingent. How. St. § 5529. It reads as follows: "Future estates are either vested or contingent; they are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; they are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain." Upon the birth of James L. Moran, (1832,) he, under this statute, was the person in being entitled to the immediate right of possession upon the ceasing of the life estates. He became possessed of a vested estate in remainder, subject to be reopened to let in afterborn children. It was twice thus reopened. It is provided by How. St. § 5551, that "expectant estates are descendible, devisable, and alienable in the same manner as estates in possession." It is the policy of the law in America not to tie up estates. Each of the children of Louis Moran possessed an alienable estate, and the grantee of either, in the absence of limitations to the contrary, would succeed to the entire estate of the grantor, and take it subject to be reopened in the same manner as though the title had remained in the original devisee. The life estates, by purchase, became merged in the vested estate in remainder. What interest was there then outstanding? Manifestly, none. Could any portion of their title be divested, and, if so, how? None of it could be divested except by the birth of another child; but this would not divert the entire title of either, but would only take away so much of the title of each as would give the newly-born heir an equal interest with them. In our judgment, these conclusions are warranted by the statute above cited, and are sustained by a long list of authorities. Doe v. Perryn, 3 Term R. 484; McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652; Baker v. McLeod's Estate, (Wis.) 48 N. W. 657; Wilson v. White, 109 N. Y. 59, 15 N. E. 749; Taggart v. Murray, 53 N. Y. 233; L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077; Fitzhugh v. Townsend, 59 Mich. 427, 27 N. W. 561.

2. Even if we are not correct in the conclusions above reached, still the complainant must prevail, for another reason. In L'Etourneau v. Henquenet, supra, it was expressly held that section 5551, How. St., applied to contingent estates, and that, when alienated, if they are defeasible they are subject to the contingency by which they may be defeated. It follows that, when such estates are held by minors, they may be sold by their guardians under the direction of the court of chancery; otherwise, it would result that, however important and necessary it might be to sell such estates in order to provide a proper support and education for their wards, these estates would be unavailable for that purpose. Our statute is largely copied from that of New York, and under the life provisions it has there been held that such estates could be sold and conveyed under the direction of the court. Dodge v. Stevens, 105 N. Y. 585, 12 N. E. 759; Jenkins v. Fahey, 73 N. Y. 355. The proceedings instituted to convey such interests being regular, the guardian's deed issued in pursuance thereof conveyed the entire interests of the children to the grantee. This disposition of the case renders it unnecessary to discuss or determine the questions of laches or title by adverse possession. Decrees affirmed, with costs.

McGRATH, C. J., did not sit. The other justices concurred.

L'ETOURNEAU et al. v. HENQUENET et al.

(50 N. W. 1077, 89 Mich. 428.)

Supreme Court of Michigan. Dec. 23, 1891.

Appeal from circuit court, Wayne county, in chancery; Cornelius J. Reilly, Judge.

Suit in equity by Louis J. l'Etourneau and another, administrators, against August Henquenet and others, to remove a cloud from the title of real estate. Defendants had a decree, and complainants appeal. Reversed.

Eldredge & Spier, for appellants. Barbour & Rexford, James J. Atkinson, William F. Atkinson, S. S. Babcock, T. M. Crocker, and Edward E. Kane, for appellees.

CHAMPLIN, C. J. The bill is filed to remove a cloud upon title, and to obtain a construction of a will, which is quite fully set out in the opinion of my Brother Morse. But two questions are involved, and they relate to the construction to be given to the third and eighth clauses of the will—First. Does the fee of the real estate devised by the third clause vest in the devisees therein named, upon the death of the testator? Second. If it did vest under the third clause, was it subject to be divested under the eighth clause, in case of the death of either of the devisees before the termination of the precedent estate devised to the widow? The answer to these questions must depend upon the intention of the testator, either as expressed or inferred or assumed, in accordance with the well-established canons of construction. The fundamental rule of construction is that the intention of the testator must be gathered from a consideration of the whole instrument together, giving to each part or clause due weight, as expressing some idea of the testator in the disposition of his property. The first and dominant idea of the testator, as manifested in this will, is that his wife, Clotilde, shall have a life-estate in possession of all his property, real and personal, with remainder over to his children, as therein set forth. The time of enjoyment of the remainder was postponed until the death of his wife. Section 5523 of Howell's Statutes enacts that "estates, as respects the time of their enjoyment, are divided into 'estates in possession' and 'estates in expectancy.'" Section 5525 enacts that "estates in expectancy are divided into—First, estates commencing at a future day, denominated 'future estates;' and, second, 'reversions,'" Section 5526 defines a "future estate" as "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or the determination, by lapse of time or otherwise, of a precedent estate created at the same time." "When a future estate is dependent upon a precedent estate it may be termed a 'remainder,' and may be created and transferred by that name." Section 5527. We have here, then, under the third clause of this will, a vested future estate, within the very terms of the statute, devised to Sarah, Emily, and Eleanor.

The question now arises, was it the intention of the testator to make this vested future estate subject to be defeated by the contingency mentioned in the eighth clause? In the first place, it will be noticed that the habendum clause does not devise the estate absolutely to Sarah, Emily, and Eleanor, and their heirs and assigns, forever, unqualifiedly, but adds this significant qualification: "After the determination of the life-estate aforesaid." He made no such qualification in the habendum to his devise to Josephine, nor in the habendum to his two sons, in the fifth clause. After disposing of the remainder to certain of his children named, excluding Margaret, the daughter of his deceased son, Charles, he then makes such remainder subject to the following contingency: "And whereas, one or more of my said children may not survive me, or my said wife, I hereby order, direct, and devise the share of such devisee or devisees in such case to be equally divided among the remaining children herein named, and to their heirs, share and share alike." It is claimed that this clause is obscure, and open to two constructions. I do not so regard it. The testator was looking to the future. The question with him was, what provisions should be made with reference to these remainders in case either of his children named to whom he had devised the lands in remainder should die before he did, or before his wife, to whom he had granted the life-estate in possession? If such contingency should happen, he devises the share of such devisee or devisees to the surviving children named, to whom the share or shares had been given, and to their heirs, share and share alike. The obvious sense and meaning is that one or more of "my children may die before my will can take effect by my death," and he provided for that contingency should it happen; and it also occurred to him that one or more might die before they could come into possession by the death of his wife, and in either case he provided what should be done with the share of such children named,—it should go to the heirs of any such deceased child, share and share alike. He disinherited no child of his children named as devisees. He did not intend that Margaret should, in any event, share in the "worldly effects" left by him. He gave explicit reasons for that, and provided that, if she should survive him, she should be paid $10 by his executor out of his personal estate. Can it be supposed that, after making this declaration of his intent not to have Margaret share in his estate, he, by the next clause, admitted her to a share in the devises he had given to his children in case one or more died before he or his wife died? It seems to me that such a construction would be a forced one, and quite contrary to the intention expressed.

Neither can I construe the language to mean that "my said wife may not survive

me." This construction destroys the whole scheme of the will. The will can have no force unless there be an intermediate estate in his widow, and the legacies would all lapse. He did not intend that any of his property should be administered as intestate property. He disposed of the whole, and yet, to give this clause the construction contended for by counsel for defendant, causes these shares to be administered the same as intestate estates, and admits Margaret to share in the real estate, contrary to the will of the testator. The remainder to his children was subject to the limitation of the eighth clause. The devise to his children created a vested estate, subject to be defeated by the subsequent contingency stated in the eighth clause. As to the shares of any child or children dying before the death of Clotilde, they became a contingent remainder to the surviving children, and the heirs of any deceased child, at the termination of the precedent estate of Clotilde. As to such the precedent estates in remainder terminated on the death of such child, and a contingent remainder was created in the surviving children and the heirs of any deceased child. Such contingent remainder could not vest until the death of Clotilde, for until then it could not be known who would be entitled to it as heirs or survivors. In the language of the statute, it was contingent while the person to whom it was limited to take effect remained uncertain.

By the statute, contingent estates are made to depend upon two conditions,—one is while the person to whom the estate is given remains uncertain, and the other when the event upon which such estates are limited to take effect remains uncertain. In this case the event upon which they are limited to take effect must be uncertain, for the reason that one or more of the children, if the contingency happened, must die before his wife, Clotilde,—events which must happen, if at all, within a certain time; and it is the event, and not the time, that controls, in determining the question as to whether the remainder is contingent or vested. But they are contingent also while the person to whom they are limited to take effect remains uncertain, and that is the contingency in this case; for it was not known at the time the testator made his will, or at the time when he died, that Charles and Eleanor and Emily would each die before his wife, Clotilde, should die. And by the eighth clause he made the contingency to happen, not upon the time of distribution, but the contingency was annexed to the gift itself, and in such cases they have been regarded as contingent, and not vested, remainders. A vested estate, whether present or future, may be absolutely or defeasibly vested. In the latter case, it is said to be vested, subject to being divested on the happening of a contingency subsequent. Chapl. Suspen. § 57; Manice v. Manice, 43 N. Y. 303; Howell v. Mills, 7 Lans. 193; Kelso v. Lorillard, 85 N. Y. 177; Baker v. McLeod's Ex'rs (Wis.) 48 N. W. 657; Burnham v. Burnham, Id. 661. And where there is a substituted devise, to take effect in case any of the class died during the precedent estate, the remainder is then vested in the existing members, subject to opening to let in new members, and to be wholly diverted in favor of the substituted devise as to the share of the member dying. Chapl. Suspen. § 59; Smith v. Scholtz, 68 N. Y. 41; Baker v. Lorillard, 4 N. Y. 257; Du Bois v. Ray, 35 N. Y. 162. In Carmichael v. Carmichael, 43 N. Y. 346, there was a devise to the testator's wife for life, and from and after her decease to testator's children who might then be living. The court held that "the estate does not vest in remainder until her [the widow's] death, and then it vests only in those children who shall be living at the time of her death." See, also, Hennessey v. Patterson, 85 N. Y. 91.

It remains to be considered what effect shall be given to the mortgages executed by Emily upon the property described in the third clause of the will. These were executed after Eleanor's death, and purported to be upon the undivided five-twelfths of the real estate described in the third clause of the will. Emily was at that time vested with the undivided third interest in remainder in the land. Timothy had died in 1861, leaving four of the six children at the time the mortgages were executed. Both Eleanor and Timothy died childless, without heirs. Emily evidently supposed that the one-third interest in the remainder of Eleanor was to be divided among the four surviving children, and she would on that basis be entitled to the undivided one-third of one-fourth, as she considered, equal to one-twelfth, which, together with her four-twelfths, would equal five-twelfths; and upon this share she executed the two mortgages set out in the bill. The property is said to be worth $25,000. Section 5551, How. St., provides that "expectant estates are descendible, defeasible, and alienable in the same manner as estates in possession." Contingent estates, although not vested, are within the provisions of the section; but when alienated, if they are defeasible, they are subject to the contingency by which they may be defeated. Emily's estate was subject to be defeated by her death before that of her mother, by which the estate then vested in her was cast upon her surviving brother and sisters, share and share alike; and of this the purchaser or mortgagee must take notice. She could not defeat the remainder from vesting in her brother and sisters upon the contingency of her death before she was entitled to come into the possession, for the statute declares that "no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise." How. St. § 5548. Neither can

these expectant estates of her brother and sisters be defeated by the manner of dealing with the estate by the devisees of the testator. I find no evidence in the record that the devisees ever dealt upon the basis now contended for by defendants, who divide the estate into 54 shares, giving Emily 21 and Margaret 3 fifty-fourths; nor, in my opinion, does the will executed by Timothy lend any aid to defendants' counsel. That will was dated the 4th day of December, 1861. He died on the next day. His father was already dead. The will shows that he did not at that time suppose that he had any vested estate in the remainder left to him and his brother Louis. This is the language he makes use of in disposing of his estate: "Second. I give, grant, and devise all and every my interest, right, and estate, after the payment of said debts and expenses aforesaid, whether real or personal, and whether present or in remainder (being chiefly my interest and estate in the personal property and real estate left by my deceased father, Francis l'Etourneau, by his last will), to my sisters Emily, Sarah, and Eleanor l'Etourneau, and to my sister Josephine Paquette, and my brother the Rev. Louis J. l'Etourneau, equally to be divided between them, share and share alike; subject, nevertheless, to and under the limitation hereinafter mentioned—First. In case of the death of my said sister Mrs. Josephine Paquette, and of the heirs of her body, before said estate so left by my father in remainder shall become vested, I direct that her share shall descend, and hereby devise her share of said estate, to my surviving brothers and sisters equally, to be divided amongst such survivors, share and share alike. Second. On the death of either of my said sisters or brothers before said estate so as aforesaid devised by me shall become vested in them, I direct and devise that the share of said deceased sister or brother go to the survivor or survivors equally, to be divided share and share alike." It is apparent that he did not regard the remainder left by his father as yet having vested in him, and it will be further noted that he gives the property in the same manner and to the same persons mentioned in the eighth clause of his father's will. He provides for the contingency of either of his sisters or brother dying before the estate given by himself becomes vested in them, and directs that such share shall be equally divided between the survivors, share and share alike; thus treating his estate as a contingent remainder, and not to vest in his devisees until the death of his mother. Emily made her will May 2, 1868, she only assuming to devise "such property, real and personal, as I have or may hereafter during my life inherit at any time." This will throws no light upon the construction to be placed upon that executed by her father. Moreover, I consider it would be an unsafe doctrine to hold that the intention of a testator should be ascertained from the claims made by devisees who are anxious to obtain the property which they think they are entitled to under their construction of the will. In my opinion, the mortgagees have no claim upon Emily's share, which by the eighth clause passed to the surviving brother and sisters. Whether the eighth clause constituted a contingent remainder or not in such as should take under it, it can make no difference in the result in this case, because Emily having died without heirs, before the death of her mother, her interests and estate, whether vested or contingent, were defeated, and passed to the surviving children, and the heirs of any deceased children, who upon Clotilde's death became seised in fee of the remainder, and entitled to the immediate possession of the lands devised. It is my opinion that the decree of the circuit court is erroneous, and should be reversed, and a decree entered herein in accordance with these views.

McGRATH and LONG, JJ., concurred.

MORSE, J. (dissenting). Francis l'Etourneau died August 26, 1860, leaving a last will and testament. After providing that his debts, funeral and other proper expenses be paid out of his personal property, he devised his estate as follows: "Second. I give, grant, devise, and bequeath unto my beloved wife, Clotilde l'Etourneau, as a testimony of my great love for and confidence in her, for and during her natural life, all and every my real estate, which is hereinafter more particularly described, in the devises following; and all that I may be seised of or possess at my decease, and all and every my personal estate, whether in money, goods, chattels, bonds, obligations, or choses in action; to have and to hold the said real estate, and its appurtenances to her, the said Clotilde l'Etourneau, for and during the full term of her natural life, with remainder over as hereinafter set forth; the said personal property to be under her absolute control, to sell and dispose of as she may deem fit or desire; and I desire and request my beloved wife, so far as may be in her power, to keep our children and family together as heretofore. Third. After the determination of the aforesaid life-estate of my wife, Clotilde, I give, grant, and devise unto my daughters, Emily, Sarah, and Eleanor l'Etourneau, all that certain tract and parcel of land situate, lying, and being in the city of Detroit, in the state of Michigan, known as the 'Western Hotel Property,' and described as follows, to-wit: Lots twenty-one and twenty-two, in block five, fronting on Woodbridge street, on the Cass front; reference being had to the recorded plat thereof, surveyed by John Mullet, together with all and singular the hereditaments and appurtenances, rents, issues, and profits thereof; to have and to hold the same to the said Sarah, Emily, and Eleanor, their heirs and assigns, forever, after the determination of the life-estate aforesaid. Fourth. After the determination of the life-estate of my wife,

Clotilde, as aforesaid, I give, grant, and devise unto my married daughter, Josephine Paquette, all that certain piece and parcel of land situate, lying, and being in the county of Macomb and state of Michigan, lying on the river Clinton, and bounded as follows: In front by the said river; on the east by lands formerly belonging to Etienne Dulac and Joseph Campau; on the south-west by lands formerly belonging to Batist Peltier; and on the rear by lands formerly belonging to Batist Thomas, Jr.; and containing seventy-two and a half acres, more or less,—the same being a part of the tract granted by the United States by patent dated 7th October, A. D. 1811, to Louis Petet, and by said Louis Petet and wife conveyed to me; together with all and singular the hereditaments and appurtenances thereunto belonging; to have and to hold the same to the said Josephine Paquette, and to the heirs of her body gotten, with remainder over to her or their heirs. Fifth. After the determination of the aforesaid life-estate devised to my wife, Clotilde, I give, grant, and devise unto my sons, the Reverend Louis Job l'Etourneau and Timothy E. l'Etourneau, all and every those tracts and parcels of land hereinafter described, viz.: My present homestead, situate and being in the village of Mt. Clemens, in Macomb county and state of Michigan, being lots in James Williams' addition to said village, and numbered, according to a survey and plat thereof by J. Wesalowski, as Nos. three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four, being the same conveyed by James Williams and wife to me; and also those lots in the city of Detroit (formerly in the town of Hamtramck, in the county of Wayne, Michigan) known and described as lots numbers thirteen and fourteen, in block number seven, in the subdivision of the 'Witherell Farm,' so called, or private claim number ninety, according to the survey and plat thereof made by A. E. Hattion, and duly recorded; together with all and singular the hereditaments and appurtenances thereunto belonging; to have and to hold the same unto the said Rev. Louis J. l'Etourneau and the said Timothy E. l'Etourneau, their heirs and assigns, forever. Sixth. After the death of my beloved wife, I give, grant, and bequeath unto each and every of my children above mentioned, and to their heirs and assigns, all my personal property and estate, if any there be then remaining, equally to be divided amongst them, share and share alike; and for the amicable arrangement of the said division, without expense, I give and grant unto my surviving executor, or such person as may be properly appointed to complete the trusts of this will, full power and authority to sell and dispose of the same for the best price, and to divide the proceeds amongst my said children, or their heirs, equally as aforesaid, unless they shall agree amongst themselves to such division. Seventh. I do here remember my granddaughter, Margaret, the child of my late son Charles R. l'Etourneau, and believing that in his life-time I had given to her father of whom she is sole heir, his full share of my worldly effects, I hereby bequeath to the said Margaret, if she shall survive me, the sum of ten dollars, to be paid to her by my executors out of my personal estate. Eighth. And whereas, one of my said children may not survive me or my said wife, I hereby order, direct, and devise the share of such devisee or devisees in such case to be equally divided amongst the remaining children herein named, and to their heirs, share and share alike." His wife and his son Louis were made executors, with full power to the survivor of them.

There survived the said Francis l'Etourneau, his wife, Clotilde l'Etourneau, and the following children named in said will: Louis J. l'Etourneau, Timothy l'Etourneau, Emily, Eleanor, and Sarah l'Etourneau, and Josephine Paquette. On the 5th of February, 1861, Timothy E., one of the sons and devisees named, died at Mt. Clemens, testate. On the 13th day of May, 1862, Eleanor, one of the daughters and devisees named, died at Mt. Clemens, intestate, unmarried, and without issue. The daughter Emily married the defendant August Henquenet, and died testate, at Mt. Clemens, on the 15th day of October, 1887. John Otto was appointed administrator of her estate with the will annexed. At the death of Mrs. Clotilde l'Etourneau, on the 29th day of August, 1888, there survived of the children and devisees named in the will of Francis l'Etourneau, deceased, the following: Louis J. l'Etourneau and Sarah l'Etourneau and Mrs. Josephine Paquette. On the 16th day of October, A. D. 1888, Sarah l'Etourneau was adjudged incompetent by the probate court of Macomb county, and Louis J. l'Etourneau was appointed her guardian, and qualified as such. The complainants Louis J. l'Etourneau, and Sarah l'Etourneau, by her guardian, filed this bill of complaint in the circuit court for the county of Macomb, in chancery, December 6, 1888, praying that the court might determine their interests in the property mentioned in the third clause of the will, known as the "Western Hotel Property," and described as lots numbers 21 and 22, in block 5, facing on Woodbridge street, on the Cass front, reference being had to the recorded plat thereof, surveyed by John Mullet. August Henquenet is made a defendant because he claims a life-estate in five-twelfths of the premises under the will of his wife, Emily. Francis J. De Broux is the holder of a mortgage upon five-twelfths of the property, executed February 3, 1872, by Emily Henquenet and her husband to William C. Groesbeck for $2,000, and assigned by him to Charles Ryckeart January 4, 1881, and by Ryckeart to De Broux, July 16, 1888. January 15, 1885, Emily Henquenet executed another mortgage on five-twelfths of the same premises for $5,000 to De Broux. This was assigned July 8, 1885, to Joseph F. De Poorter, who subsequently died intestate. Defendant

Duchaineau is executor of his will, and the Congregation des Freres de la Charite, a foreign corporation, claims under the will of De Poorter an interest in this mortgage. At the time of the filing of this bill the mortgage had been foreclosed by an advertisement and bid in by De Broux. Josephine Paquette, a daughter of Francis l'Etourneau, after the death of Eleanor, claimed a one-twelfth interest in the property, and conveyed the same, September 2, 1884, before the death of her mother, to one Morton. By mesne conveyances it passed from Morton to one Horace Brewer. Upon Brewer's death it descended to Charles Brewer, who died leaving two minor children, Florence and Horace Brewer, who, with their father's administrator, are made defendants.

The complainants claim that, under the eighth clause of the will, Eleanor and Emily, who died before their mother, never had any vested interest in this property, and that one-third of it at the mother's decease became vested in Sarah, and the other two-thirds in equal shares in Louis, Sarah, and Josephine, dividing the title as follows: Five-ninths in Sarah, and two-ninths each in Louis and Josephine. Josephine seems now to be interested in this construction of the will, although, in the disposition of the property willed to her, she has heretofore, as have all the family, acted upon the supposition that the contention of the defendants was the correct one in the interpretation of her father's will. The defendants' contention is that, upon the death of Francis l'Etourneau, Emily, Sarah, and Eleanor, who were all then living, were vested each with an equal undivided share,—three-ninths,—subject only to the life-estate of their mother. Eleanor dying without issue, and intestate, her three-ninths of the premises descended in equal shares to her mother, Louis, Sarah, Emily, and Josephine, and the granddaughter Margaret, leaving the title distributed as follows: Emily and Sarah each 21-54; and Josephine, Louis, and Margaret each 3-54, subject to the life-estate of the mother; and the mother 3-54 and her life-estate in the whole. It was under this idea of the condition of the title that Emily executed the two mortgages, and Josephine deeded to Brewer. Timothy died less than six months after the decease of his father. He made a will, February 4, 1861, two days before his death, by which he devised all his property, whether present or in remainder, ("being chiefly my interest and estate in the personal property and real estate left by my deceased father, Francis l'Etourneau, by his last will,") to his sisters Emily, Sarah, Eleanor, and Josephine, and his brother, Louis, share and share alike; providing that, in case of the death of his sister Josephine, and of the heirs of her body, "before said estate so left by my father in remainder shall be vested," her share shall descend in equal parts to the surviving sisters and brother; and that, "in case of the death of either of my said sisters or brother before said estate so as aforesaid devised by me shall become vested in them," the share of said deceased sister or brother shall descend equally to the survivor or survivors. The property willed to Timothy by his father was devised in equal shares to Louis and Timothy. The homestead has never been conveyed, but the Detroit or Hamtramck property was sold. The first deed of lot 14 was a warranty deed, signed by Louis alone. Afterwards it would appear that some of the family, if not all of them, joined with him in the conveyance, and mortgages were taken back on the land. The mortgage on lot 13 ran to Louis and his mother, and on 14 to Louis, Sarah, Emily, and their mother. Louis says he received $750 of this property, which was a part of the money received for the lots. These lots were sold between 1869 and 1873. The will of Timothy was proved and admitted to probate. It does not appear that he had any other property than that willed to him by his father. If the contention of the complainants is correct, he has nothing to will away. When Timothy died, Sarah, Eleanor, Louis, Josephine, and Emily were living; and there is evidence tending to show that Louis recognized the fact that Emily had an interest in the homestead, as devisee of Timothy, and proposed to trade his one-twelfth interest in the Woodbridge-Street property, as heir of Eleanor, for Emily's interest in the homestead. Louis testified that, after the death of Timothy, the Hamtramck property was treated as the property of the family. Josephine sold the farm willed to her by her father, August 10, 1886. None of the family, except her mother, joined in the deed, and she had the whole proceeds of such sale; her children also conveyed their interests. Immediately after the death of her father, she took possession of this farm, and it was always treated as her property, subject only to the life-estate of her mother, and the remainder over to her children, and she and her husband made valuable improvements upon it.

Emily in her life-time, being the eldest member of the family at home, assisted her mother in the management of the property, and it seems to have been her idea, as well as her mother's, that the several devises in her father's will vested upon his death. Acting upon this idea, she executed the two mortgages upon her portion. She also made a will, dated May 2, 1868, in which she devised all her estate, which she had inherited or might inherit, to her husband during his life, with remainder over to her brother Louis and her sisters Sarah and Josephine, and their heirs, and all her property not acquired by inheritance, absolutely to her husband and his heirs. She named her brother Louis as her executor. Under the same impression Josephine disposed of her property, and deeded an interest in the Woodbridge-Street property to Morton, which interest is now held by the minor children of Charles Brewer. It is also evident that Louis had the same understanding of the will, and acted upon it. He was a priest in orders at Notre Dame, Ind., and says that he took but little interest or concern in the

estate, acting entirely upon the suggestions of Emily and his mother, and executing the deeds and other papers they sent him, and taking what money they chose to send him, without question. But he knew of the mortgages executed by Emily, and made no protest against them. February 20, 1888, before his sister's death, but after the death of Emily, he wrote a letter to De Broux, who is also a Catholic priest, in answer to one received from him, claiming that Emily's husband had used all the money received from the loan evidenced by the $5,000 mortgage. It would appear from this letter that De Broux was seeking a payment of the mortgage from the estate of Emily, Louis being named executor in her will, or from Louis and the mother. Louis in his letter says that he had delayed writing in order that he might get the advice of a "learned professor" at Notre Dame, and that such advice coincided with his own views. He further writes that he did not know until she died that he had been named in his sister's will as executor, and that he had turned over the trust to Mr. Otto, at Mt. Clemens, being sick at the time his sister died. He concludes his letter as follows: "As you can well understand, neither I nor any member of our family is responsible; nor can I in justice, nor in conscience, be bound to pay one cent, either of interest or capital, of any moneys which Mrs. Henquenet borrowed, since Mr. H. has received it all for his own benefit. I do not know how the mortgage is made. I would indeed be sorry that any one should lose anything through my fault, and I do not see any other method to get back the money you lent, except by foreclosure on the property in Detroit. Of course, only Emily's share in that property could be attacked, and, if there was not enough there, she had a half share in a lot and house in Mt. Clemens. Mr. Henquenet has acted in all this in a most unjust manner towards our family; for the Detroit property was devised to him only for his life-time, and then it was to revert to the family. How can he, as a Catholic, be safe in conscience? As long as my mother lives, she has a right to all the revenues of the Detroit property. We had not the means to take up the mortgage, and, if we had, it would be folly for us to do so, as Mr. H. could play the gentleman at our expense as long as he lives. Mr. H. is obliged to pay the interest on the money he got, and, if he refuses, what remains to be done is, I presume, to foreclose on that property that was mortgaged. If Mr. H. could succeed, he would gladly grab every cent of the family. If he has $30,000 worth of property in Hope, he is indebted to our family for it. But he is not thankful for this. He pretends that we have done nothing for him. May God forgive him. I presume it would be advisable to see Mr. Otto, whom I appointed to replace me in regard to my sister's affairs. I will send him a copy of your letter, and will tell him of my writing to you. I hope, Rev. Father, that the parties who hold the mortgage will not suffer any loss, nor you either. I understand that Fr. Ryckaert has a mortgage on that property for $2,000. Wishing you all blessings, I remain your sincere friend in the Sacred Heart, L. J. L'Etourneau, C. I. C."

This letter shows conclusively that he then understood the will as Emily understood it, although he attempted to convey the impression in his testimony that he had no thought or understanding about it until he took legal advice some time afterwards, when he thought Mr. Henquenet was becoming "aggressive." It therefore conclusively appears that all the members of this family, except Sarah, who was incompetent and unable to act for herself, for 28 years since the death of their father, have understood and interpreted his will as the defendants now contend it should be construed, and have uniformly acted upon such understanding and interpretation until within a short time before the filing of this bill. In equity the complainants Louis and Josephine ought to be estopped from now placing a different construction upon this will,—one that will declare these mortgages void and of no effect, and leave the innocent holders of them without any remedy or redress, except against the estate of Emily, which amounts to but little, if anything, outside of the property she supposed she inherited from her father. If the language of the will was so clear and certain that the construction claimed by complainants must prevail, we should not hesitate, under the rule that he who seeks equity must do equity, to leave the matter where these adult heirs, as far as they are concerned, have left it by this family arrangement and understanding of over a quarter of a century. Since the filing of this bill, the incompetent, Sarah, has died, and the bulk of her interest in her father's estate will descend to Louis and Josephine. They, with the granddaughter Margaret, are the sole heirs to the property. But we are satisfied that the proper construction of this will is as the mother and children construed it in the first place. It will be noticed that the third clause of the will devises this property: "To have and to hold the same to the said Sarah, Emily, and Eleanor, their heirs and assigns forever, after the determination of the life-estate aforesaid." If it were not for the eighth clause of the will, it would not be doubted that, on the death of their father, the fee of this property would have vested in these three girls, subject only to the life-estate of their mother. The eighth clause reads as follows: "And whereas, one or more of my said children may not survive me *or my said wife*, I hereby order, direct, and devise the share of such devisee or devisees in such case to be equally divided amongst the remaining children herein named, and to their heirs, share and share alike." The italics are ours.

The intent of this clause as it stands, and

connected with the other clauses of the will, is not clear and certain. The complainants' counsel, to make it harmonize with his views, claims that the word "or" in the italicized words must be read "and," so that it will read, "may not survive me and my said wife." The counsel says: "We submit that the word 'or' in the eighth clause, where it occurs in the expression, 'survive me or my said wife,' should be read 'and.' The testator had in the third clause, by very forcible and clear language, attempted to postpone any effect of his gift to the three daughters until the death of his wife. He now in the eighth clause is providing for the distribution to be made, when the gift is to operate, and contemplates the contingency of the death of one or more before distribution. It is impossible to conceive why the wife is mentioned at all in the eighth clause on any other hypothesis. 'Or' will be read 'and' whenever such reading is necessary to give effect to the evident intent of the testator." It is possible in my mind to conceive why the wife is mentioned upon another hypothesis, and I think with Mr. Atkinson, as stated in his brief, that the sentence was intended by the testator as follows: "And whereas one or more of my said children may not survive me, or my said wife may not survive me, I hereby order," etc. That, in the contemplation that some of the children might die before he did, the thought also occurred that his wife might not survive him, and that the awkwardness or incompleteness of the expression is that of the scrivener, and not of the testator's intention.

In connection with this matter, it is noticeable that the same person who drafted the will also drew the will of Timothy, who had nothing to devise in his father's estate, if the construction of his father's will be as contended by the complainants. We agree with the complainants' solicitor that "the commanding and controlling rule of interpretation requires that the intention of the testator ascertained from the will, looking to the whole of it, and reading it in the light of the surroundings of the testator at its date, is to be given full effect, if lawful. Is it to be supposed that the testator intended to disinherit the children of his children, if any child of his, living at his death, should die before the wife and mother did? He is very particular to state why he wills no more to his grandchild Margaret, daughter of a dead son, and gives her $10, if she survives him. Josephine was married and had two children. Did he intend to disinherit them, if their mother died before his wife did? On the contrary, he evidently intended by the fourth clause of his will that the property devised to Josephine should go at her death to the heirs of her body. It will be observed that the grants to the other children are to them, "their heirs and assigns;" while in Josephine's case the word "assigns" is omitted, clearly showing an intention that Josephine could not dispose of the farm without her children's consent, and under this idea they joined with her in conveying it when she sold it. Yet if Josephine had died before her mother, under the complainants' theory her children would have been disinherited. It is the policy of our laws not to disinherit heirs, unless it clearly and distinctly appears that such was the purpose of the testator. The law also favors vested estates, and a remainder is not to be construed as contingent when it can consistently be construed to be vested. A will speaks from the testator's death, and legacies then vest, unless a contrary intent is clearly indicated in the will. Eberts v. Eberts, 42 Mich. 404, 4 N. W. 172; Rood v. Hovey, 50 Mich. 395, 15 N. W. 525; Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Rivenett v. Bourquin, 53 Mich. 10, 18 N. W. 537; Association v. Montgomery, 70 Mich. 587, 38 N. W. 588; Porter v. Porter, 50 Mich. 456, 15 N. W. 550; McCarty v. Fish (Mich.) 49 N. W. 513. The case of Rood v. Hovey, supra, is very closely in point with the case here. The will devised a life-estate to his widow, remainder to his children "now living, or who may be at the time of her decease or marriage." The word "or" might be read "and" as well in this instrument as in the one before us; in which case it would appear as clearly as here that the legacies were not intended to vest, and that the children of a child, dying between the death of the testator and the decease of his widow, would be disinherited. All the children survived the testator, but two died before the widow, and one left surviving him a widow and children. Mr. Justice Campbell, speaking for the court, after referring to the general rules of construction, which have been heretofore pointed out in the present opinion, says: "We do not think it proper to go into any extended discussion of the testamentary law, because we have not been able to discover the least ambiguity in the language of this will. It says as plainly as words can make it that all of his children then living shall share in his estate not otherwise disposed of; that is, in all but the widow's interest. If there had been no other words, no one could dispute that their interest was vested. The remaining words, 'or who may be at the time of her decease,' might very well apply to posthumous children, but the form of the expression is not such as to indicate an intent to qualify the former language as to living children. There is nothing in the rest of the will favoring the idea that he had any purpose of disinheriting any of the offspring of his children. No amount of reasoning can throw much light on the meaning of the will. In our opinion, the language used conforms to the general purpose of the law, and is best interpreted by the general rules before referred to." We think the language of Mr. Justice Campbell applicable to the will before us, and that it controls this case. See, also, Porter v. Porter, 50 Mich. 456, 15 N. W. 550; Rivenett v. Bourquin, 53 Mich. 10, 18 N. W. 537. In this view of the intent and construc-

tion of the will, the court below was correct, and found in its decree that the interest of Eleanor, at her death, descended in equal shares to Clotilde, the mother, Louis, Emily, Sarah, Josephine, and Margaret. The mother having died and devised the property to Louis, Sarah, and Josephine, the decree fixes the title at the time of the submission of the cause as follows: Emily's estate, 21-54; Sarah's estate, 22-54; Louis, 4-54; Margaret, 3-54; Florence Brewer, 2-54; and Horace Brewer, 2-54,—being the share divided between them belonging to Josephine, and which she conveyed to Morton. The mortgages given by Emily were decreed to be a valid lien upon an undivided 21-54 of the property. That the 21-54 belonging to Emily's estate passed in equal shares of 7-54 to Sarah, Josephine, and Louis, subject to the life-estate of August Henquenet. The court also found that the Brewer children, through Mrs. Paquette's deed of one-twelfth of these premises to Morton, under whom they claim, were entitled to so much of her share of Emily's interest in the premises as was equal to one-twelfth of the same. The decree should be affirmed, with costs of this court against the complainant Louis J. l'Etourneau, in favor of the defendants Brewer, Henquenet, De Broux, and Duchaineau.

GRANT, J., concurred.

WHITESIDES et al. v. COOPER.

(20 S. E. 295, 115 N. C. 570.)

Supreme Court of North Carolina. Oct. 24, 1894.

Appeal from superior court, Buncombe county; Armfield, Judge.

Action by John B. Whitesides, as guardian, and others, against C. S. Cooper, to recover an undivided one sixth interest in certain lands, claimed to have been devised to them by the will of their grandfather, John B. Whitesides, deceased. From a decision for plaintiffs, defendant appeals. Affirmed.

F. A. Sondley and W. R. Whitson, for appellant. M. E. Carter, for appellees.

SHEPHERD, C. J. The numerous authorities cited in the elaborate brief of the plaintiffs' counsel fail to convince us that we are warranted in so far departing from the plain and natural import of the language used in the limitation before us as to hold that the seven sons named in the will of their father took a vested remainder in the land therein devised. Fully appreciating, as we do, the public policy which induces the courts to favor the early vesting of estates, we are nevertheless of the opinion that it would be doing violence to the most liberal rules of construction were we to say that it was the intention of the devisor that the estates limited to his said sons should vest before the death of his widow, the life tenant. On the contrary, it was his evident purpose that the entire remainder in fee should be disposed of absolutely at a definite time, and that he did not intend that the remainder as to any part of the property should become vested while the remainder in the residue was dependent upon a contingency. After a limitation to the wife for life, the will proceeds as follows: "At the death of my said wife, the said plantation, with all its rights and interests, I bequeath and devise to our seven sons, namely, Henry Clay, James Hardy, Charles Lincoln, Frank Patton, Simpson Jarrett, William Ratliff, and John Bowman, *or such of them as may be living at their mother's death*, and to their heirs, share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share in each and every such case." The words we have italicized very clearly do not divest by way of condition or otherwise any estate previously limited, but are manifestly used as a part of the description of the persons who are to take; and these persons are plainly such only of the sons as may survive the life tenant. In other words, the limitation, with a very slight transposition of the words, reads, "To such of my sons, Henry Clay, James Hardy," etc., "as may be living at their mother's death, and to their heirs." If the language indicating survivorship were at all doubtful, the construction we have adopted would be well sustained by the fact that the words of inheritance do not immediately follow the names of the seven sons, but they follow the qualifying language, "such of them as may be living at their mother's death." Under the construction we have put upon the will there can be no question that the limitations to the sons were contingent remainders, the contingency being that they should survive their mother, and, failing in this as to any one or more of them, the remainder to vest in his or their issue as purchasers. This, as we have said in Watson v. Smith, 110 N. C. 6, 14 S. E. 640, is a limitation of several concurrent fees by way of substitutes or alternatives, one for the other, "the latter to take effect in case the prior one should fail to vest in interest, and is known as a remainder on a contingency with a double aspect." If one of the sons die before the mother, his remainder is at an end, and can never vest, and another remainder to the issue is substituted, who take nothing from their father, but directly from the devisor. That the limitation, under the construction we have adopted, is a contingent remainder, is apparent from the decisions of this court, and these decisions, it is believed, are in harmony with the principles of the common law as enunciated by the most approved authorities in other jurisdictions. In Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011, and Clark v. Cox (at this term) 20 S. E. 176, we quoted with approval the language of Mr. Gray in his excellent work on Perpetuities: "That the true test in limitations of this character is that, if the conditional element is incorporated into the description of the gift to the remainder-man [as it is in the case under consideration], then the remainder is contingent; but if, after the words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A. for life, remainder to his children, but if any child die in the lifetime of A. his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But, on a devise [as in the present case] to A. for life, remainder to such of his children as survive him, the remainder is contingent." In Watson v. Watson, 3 Jones, Eq. 400, the devise was to A. for life, and at his death to such of his children as might then be living, and the issue of such as might have died leaving issue. It was held that A. was tenant for life, "with a contingent remainder in fee to his children who may be living at his death, and to the issue of such children as may have died in his lifetime, leaving children." See also, Watson v. Smith, 110 N. C. 6, 14 S. E. 640. In Williams v. Hassell, 74 N. C. 434, the court said that, "inasmuch as the lands are devised to the first takers for life only, with remainders to such of their children as should be living at their death, it cannot be ascertained now who are to

take the remainder." In Young v. Young, 97 N. C. 132, 2 S. E. 78, the court said: "The contingent remainders limited on the termination of the life estate are to such of her children as are then living, and to the then living issue of such as have died leaving issue; so it is impossible to tell who will be entitled when the life tenant dies." In Ex parte Miller, 90 N. C. 625, there was a devise of land to A. for life, with remainder to such children as she may leave her surviving, and it was held that the children took contingent remainders. Without resorting to the text-books, these authorities abundantly show that the element of survivorship in our case fully characterizes the limitation as a contingent remainder.

In view of the construction we have placed upon the language of the will and of the decisions of our own court, we do not deem it necessary to review the many English and other cases cited by counsel. None of them are directly in point, and, even if they were, we would not be inclined to depart from our own decisions, which, as we have already remarked, are, in our opinion, well supported by principle as well as authority. If the will should read as we have construed it (and of this we think there can be but little doubt), it is clear that these remainders are contingent. The case most strongly pressed upon us on the argument is Ex parte Dodd, Phil. Eq. 97. The decision turned upon the construction placed upon the language of the will, under which it seems that the limitation was general; that is, to all of the children of the life tenant or the issue of such children. The element of survivorship as a condition to the vesting of the remainder was considered as absent, and it was held that the remainder was vested as to the children living, subject, of course, to open and let in after-born children, or the issue of such as should die before the life tenant. That this is the ratio decidendi of the case is apparent from the opinion of the court in Irvin v. Clark, 98 N. C. 437, 4 S. E. 30. The limitation there was "to Margaret Irvin and her husband, during their natural lives, and to descend to the children of said Margaret equally." This was treated as a vested remainder, but the court was careful to say that: "If the devise had been to those children living at the death of their mother, there would have been a contingent, and not a vested, interest in either; for, until that event occurred, it would not be known who would take, and in such case the contingent interest could not be sold by a court of equity. But where the gift is general, not being confined to survivors when to take effect, it is otherwise, and, by representation, those who may afterwards come into being are controlled by the action of the court upon those whose interests are vested, but whose possession is in the future. The distinction is pointed out by Battle, J., delivering the opinion in Ex parte Dodd." As we have seen, the remainders to the sons being limited only to such of them as survived their mother, and Simpson Jarrett Whitesides, one of the said sons, having died in 1874, before the death of the life tenant in 1887, it must follow that his children, the plaintiffs, acquired the interest in controversy as purchasers; and the only question which remains to be determined is whether they are precluded from asserting their title by the conveyance of their father, and the proceedings for partition under which the land was sold, and purchased by one Davis, under whom the defendant claims.

2. If the view we have taken of this limitation is correct, it is hardly necessary to cite authority in support of his honor's ruling that the plaintiffs are not rebutted by the conveyance and warranty of their father in 1867. The case of Flynn v. Williams, 1 Ired. 509, is not in point. It was there held that where one having an estate of inheritance in possession sells the same with general warranty, his heirs are bound, whether the warranty be lineal or collateral, and whether they have assets or not. In the present case no estate whatever vested in the ancestor, and his children who take as purchasers under the will are therefore not bound by his warranty. Even had a life estate vested in him, his warranty would likewise have been ineffectual by way of rebutter. Code, § 1334; Starnes v. Hill, supra.

3. Were the plaintiffs bound by the sale for partition? It appears that in 1870 John Kimberly (who had purchased the interest of Simpson Jarrett Whitesides), together with the life tenant, Catherine, and the other contingent remainder-men, united in a petition for the sale of the land in partition. Under a decree rendered in this proceeding the land was sold, and T. K. Davis became the purchaser. The defendant claims under the said Davis, and denies the claim of the plaintiffs that they are tenants in common with him to the extent of one-sixth interest in the said land. The life tenant, Catherine, having died in 1887, the plaintiffs' contention must be sustained, unless they are bound by the decree of sale. Neither these plaintiffs (if, indeed, they were in existence at that time) nor their father were parties to the proceeding, but it is insisted that they were represented by others of the same class, or at least by the life tenant. It is plain that the other parties could not represent these plaintiffs as a part of the same class, and upon this point it is only necessary to refer to Irvin v. Clark, supra, and the authorities therein cited. Equally untenable is the position that these contingent remainder-men were represented by the life tenant. This would be a very radical departure from well-settled principles, and has received no countenance from this court. In Overman v. Tate, 114 N. C. 571, 19 S. E. 706, we quoted with approval the language of Lord Hardwicke in Hopkins v. Hopkins, 1 Atk. 590, that "if there are ever so many contingent limitations of a trust, it

is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not in esse, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." In referring to the application of this principle in one or two jurisdictions where the first remainder was only for life, we stated that we were not prepared to adopt such a view, and, a fortiori, would it be rejected in a case like the present, where the limitations are not in trust, but purely legal. Under the peculiar circumstances of the case referred to we applied the principle declared by Lord Hardwicke, the fact that the limitations were in trust not having been adverted to in a previous ruling. The decision was not based upon the idea that the child of Annie was of the same class as the issue of Caswell, but this was mentioned as a circumstance tending to show that but little prejudice would probably result by the application of the principle above stated, under the particular limitations then before us.

4. Neither is there any force in the contention that our case falls within the principle of England v. Garner, 90 N. C. 197, and other decisions in which the court has gone very far in sustaining judicial sales. It is not pretended that these plaintiffs, even if in esse, were represented by guardian, or any one claiming to be their attorney. Indeed, they are not mentioned as parties in any stage of the proceeding, nor is there anything in the decree which purports to bind their contingent interests.

5. As to the statute of limitations, it is only necessary to say that it did not begin to run against these plaintiffs until the death of the life tenant in 1887. Their rights accrued only upon that event, and it is therefore clear that they are not barred. After a careful consideration of the elaborate brief of counsel, we have been unable to discover any error in the rulings of his honor. Affirmed.

HARDAGE et al. v. STROOPE.

(24 S. W. 490, 58 Ark. 303.)

Supreme Court of Arkansas. Dec. 23, 1893.

Appeal from circuit court, Clark county; John E. Bradley, Special Judge.

Suit by W. S. Stroope against Joseph A. Hardage and others. From a decree for plaintiff, defendants appeal. Reversed.

U. M. & G. B. Rose and J. H. Crawford, for appellants. Murry & Kinsworthy, for appellee.

BATTLE, J. J. L. Stroope and wife conveyed the land in controversy to Tennessee M. Carroll, "to have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this state." After this, Mrs. Carroll conveyed it in trust to James M. Hardage to secure the payment of a debt. She had two children born to her after the conveyance by J. L. Stroope and wife, but they died in her lifetime. She died leaving no heirs of her body, but left her father, W. S. Stroope, surviving. After her death the land was sold under the deed of trust, and was purchased by Joseph A. Hardage. W. S. Stroope, the appellee, now claims it as the heir of Mrs. Carroll, and Joseph A. Hardage, the appellant, claims it under his purchase.

The rights of the parties depend on the legal effect of the following words contained in the deed to Mrs. Carroll: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this state." Appellee contends that Mrs. Carroll only took a life estate in the land under this clause, and that he is entitled to the remainder, she having left no descendants. On the other hand, the appellant contends that the remainder in fee vested in the children, and, when they died, Mrs. Carroll inherited it, and the whole estate in the land became vested in her; and that, if this contention be not true, the deed to Mrs. Carroll comes within the rule in Shelley's Case, and vested in her the estate in fee simple; and that in either event he is entitled to the land.

It is obvious that the deed to Mrs. Carroll created in her no estate in tail. Her grantor reserved no estate or interest, nor granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body in fee simple. No remainder vested in her children. It was to be inherited by the heirs of her body, and they were her descendants who survived her and were capable of inheriting at the time of her death. They might have been grandchildren. They were not the children, as they died in the lifetime of their mother.

The effect of the deed, as explained by the habendum, in the absence of the rule in Shelley's Case, was to convey the land to Mrs. Carroll for her life, and then to her lineal heirs, and, in default thereof, to her collateral heirs. As there can be collateral heirs only in the absence of the lineal, the deed conveyed the land to Mrs. Carroll, in legal phraseology, for her life, and after her death to her heirs.

Two questions now confront us: (1) Does the rule in Shelley's Case obtain in this state? (2) And, if so, does the deed in question fall within it?

1. Is it in force in this state?

Section 566 of Mansfield's Digest provides: "The common law of England, so far as the same is applicable and of a general nature and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First that are applicable to our own form of government of a general nature and not local to that kingdom, and not inconsistent with the constitution and laws of the United States or the constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state."

The rule in Shelley's Case, as stated by Mr. Preston, which Chancellor Kent says is full and accurate, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." Its origin is enveloped in the mists of antiquity. It was laid down in Shelley's Case in the twenty-third year of the reign of Queen Elizabeth, upon the authority of a number of cases in the year books. Sir William Blackstone, in his opinion in Perrin v. Blake, 1 W. Bl. 672, cites a case in 18 Edw. II. as establishing the same rule. The earliest intelligible case on the subject, however, is that of Provost of Beverly, 3 Y. B. 9, which arose in the reign of Edward III., and substantially declared the rule as laid down in Shelley's Case.

Various reasons have been assigned for the origin of the rule. Chancellor Kent, upon this subject, says: "The judges in Perrin v. Blake, supra, imputed the origin of it to principles and policy deduced from feudal tenure, and that opinion has been generally followed in all the succeeding discussions. The feudal policy undoubtedly favored de-

scents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from which he would have been exempted if he took the estate in the character of a purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was deemed a fraud upon the feudal fruits and incidents of wardship, marriage, and relief to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers, in the same manner, and to the same extent, precisely, as if they took by hereditary succession. The policy of the law will not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendible from him in the regular line of descent. Mr. Justice Blackstone, in his argument in the exchequer chamber in Perrin v. Blake, does not admit that the rule took its rise merely from feudal principles, and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth, and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, and thereby giving him the power of disposition. Mr. Hargrave, in his observations concerning the rule in Shelley's Case, considers the principle of it to rest on very enlarged foundations; and, though one object of it might be to prevent frauds upon the feudal law, another and a greater one was to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase,—an amphibious species of inheritance,—or a freehold with a perpetual succession to heirs, without the other properties of inheritance. In Doe v. Laming, 2 Burrows, 1100, Lord Mansfield considered the maxim to have been originally introduced, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and, if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts."

But, whatever may have been the cause of its origin, its effect has been "to facilitate the alienation" of land "by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." Its operation in this respect has commended it to the favorable consideration of the most learned and able men of Great Britain and the United States, and doubtless contributed to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctuations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor the locking up and rendering inalienable any class of property, it has ever been in harmony with the genius of the institutions of our country, and with the liberal and commercial spirit of the age. Hence, it has been recognized and enforced as a part of the common law of nearly every state where it has not been repealed by statute. Starnes v. Hill, (N. C.) 16 S. E. 1011; Baker v. Scott, 62 Ill. 88; Hageman v. Hageman, 129 Ill. 164, 21 N. E. 814; Doebler's Appeal, 64 Pa. St. 9; Kleppner v. Laverty, 70 Pa. St. 72; Polk v. Faris, 9 Yerg. 209; Crockett v. Robinson, 46 N. H. 454; 4 Kent, Comm. marg. pp. 229–233; 2 Washb. Real Prop. (5th Ed.) pp. 655–657.

The rule has never been changed in this state except in one respect,—estates tail have been abolished. Section 643 of Mansfield's Digest provides that, whenever any one would become seised at common law "in fee tail of any lands or tenements by virtue of a devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance." To this extent it has been repealed; in other respects it remains in full force in this state; and it was so held in Patty v. Goolsby, 51 Ark. 71, 9 S. W. 846.

2. Does this case come within the rule?

"Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs * * * (or equivalent expressions) either immediately, or after the interposition of one or more particular estates, the apparent gift to the heirs, * * *" according to the rule in Shelley's Case, "is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heirs." The theory was that, in cases which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless "the whole estate is united, and vests as an executed estate of inheritance in the ancestor." This theory was based upon the fact that "the ancestor was the sole ascertained and original attracting object,—the groundwork of the grantor's or testator's bounty,"—and upon the presumption, arising from the fact, that the grantor or testator, as the case may be, "meant the person who should take after the ancestor should be any person indiscriminately who should answer the description of heirs * * * of the ancestor, and be entitled only in respect to such description," and that the estate devised or

conveyed should vest in them in that character only. "In order to effectuate this intent, and secure the succession to its intended objects," the rule rejects, as inconsistent and incompatible with this primary or paramount intent, "any other intent than that the ancestor should take an estate for life only, and the heirs should take by purchase," and vests the estate of inheritance in the ancestor. This was considered necessary to accomplish the primary object of the grantor or ancestor. 2 Fearne, Rem. pp. 216–220.

"Hargrave has justly observed," says Fearne on Remainders, "that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that, when it is once settled that the donor or testator has used words of inheritance according to their legal import,—has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus by reference to whom the succession is to be regulated,—then the rule applies. But the rule is a means for effectuating the testator's primary and paramount intention, when previously discovered by the ordinary rules of interpretation,—a means of accomplishing that intention to comprise, by the use of the word 'heirs,' the whole line of heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated; and the way in which the rule operates, as a means of doing this, is by construing the word 'heirs' as a word of limitation, or, in other words, by construing the limitation to the heirs, general or special, as if it were a limitation to the ancestor himself and his heirs, general or special." 2 Fearne, Rem. p. 221.

In Doebler's Appeal, 64 Pa. St. 9, Judge Sharswood, in discussing the rule in Shelley's Case, said: "If the intention is ascertained that the heirs are to take qua heirs, they must take by descent, and the inheritance vest in the ancestor. The rule in Shelley's Case is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system; and, though the original reason of it—the preservation of the rights of the lord to his relief, primer seisin, wardship, and marriage—has passed away, it is still maintained as a part of the system of real property which is based on feudalism, and as a rule of policy. It declares inexorably that, where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs, qua heirs, as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so it is not possible for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. This is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply that the ancestor shall be tenant for life only, and impeachable for waste, if he interpose an estate in trustees to support contingent remainders, or, as in this will, declare in so many words that he shall in no wise sell or alienate, as it is intended that he shall have a life interest only, it will be all ineffectual to prevent the operation of the rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law."

"The policy of the rule," says Chancellor Kent, "was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers." 4 Kent, Comm. 216.

At common law the word "heirs" was necessary to convey a fee simple by deed. No equivalent words would answer the purpose. If the conveyance was not made to a man and his heirs, the grantee only took a life estate, notwithstanding the estate was limited by such phrases as "to A. forever," or "to A. and his successors," and the like. An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word "heirs." But in this state the question as to what estate a deed to land conveys is determined by the intent of the parties, as ascertained from the contents of the deed and the power of the grantor to convey. When construed in this manner, it is obvious that the intention of the deed in question was to convey the land in controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in Shelley's Case. The estate of inheritance vested in Mrs. Carroll, and she became seised of the land in fee simple. 2 Washb. Real Prop. (5th Ed.) p. 653.

"As a consequence from the foregoing principles, whoever has a freehold which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitation as may have been created between his freehold and the inheritance limited to his heirs." 2 Washb. Real Prop. 651.

It follows, then, that Mrs. Carroll had the right to convey the fee in the land in trust to secure the payment of her debts, and that a sale of such estate under the deed, and in conformity with law, was valid.

The decree of the court below is reversed, and the cause is remanded for proceedings consistent with this opinion.

EARNHART v. EARNHART et al.

(26 N. E. 895, 127 Ind. 397.)

Supreme Court of Indiana. March 11, 1891.

Appeal from circuit court, Noble county; Joseph W. Adair, Judge.

L. W. Welker, for appellant. Zimmerman & Prickett, for appellees.

OLDS, C. J. John Earnhart died testate. By item 3 of his last will and testament he gave to his granddaughter Harriet Cook, the only child of his deceased daughter, Susanah, $500, to be paid within one year after his death, or within one year after the death of his wife, if she survived him. It is specifically stated in said item that said legacy shall be paid by devisees to said will other than his wife, to-wit, "Nelson, James, Lewis, Thomas, and William Earnhart, Jane Wolf and Ellen Wolf, in equal shares; the share of each to be a charge upon the lands hereby devised to him or her, respectively." Item 10 of the will is as follows: "I give and devise to my son William Earnhart for and during the term of his natural life, subject to the life-estate of my said wife therein, the following described real estate in Noble county, Indiana, to-wit: The north half of the north-west quarter, and the west half of the north-west quarter of the north-east quarter, of section thirty-four, (34,) in township thirty-four (34) north, range nine (9) east. At the death of said William Earnhart I give and devise said lands in fee-simple to the persons who would have inherited the same from the said William Earnhart had he owned the same in fee-simple at the time of his death; the same to go to said persons in the same manner and in the same proportions as though said William Earnhart had owned the same in fee-simple at the time of his death; but the provisions of this item should only vest in the said William a life-estate in said lands, and nothing more." The appellant brings this action, setting out a copy of the will, and alleging that he owns the fee simple title to the land described in item 10 of the will; and asking that the will be so construed as to give to him the fee- simple title to said land, and that his title be quieted to the same; making the other devisees and the executor parties defendant, alleging that they claim some interest in said land adverse to the appellants. The appellees demurred to the complaint for want of facts, which was sustained, exceptions reserved, and this appeal is prosecuted, assigning such ruling as error. It is contended that item 10 of the will is governed by the rule in Shelley's Case, and that it gives to William Earnhart a fee-simple title to the land. It is settled that the rule in Shelley's Case is recognized as law and a rule of property in this state, but we do not think it applicable to the item of the will under consideration. The rule does not apply where it unequivocally appears that the persons who are to take are not to take as heirs of the grantee or devisee. In this case it is clearly and distinctly expressed, so that it unequivocally appears from the language that it was the intent of the testator that the appellant should take only a life-estate in the land. It then makes a further devise of the remainder of the estate in the land to other persons, describing them, not by name, but in a definite manner, as the persons who would inherit the same if the fee was in the appellant, and distributes it between such persons in the same proportions as they would inherit from said appellant. The words used in making disposition of the remainder are words of purchase, descriptive of the persons to whom the fee is devised. If in one item of the will the testator had devised to his son William Earnhart a life-estate in the particular tract of land, and in another item had made disposition of the remaining fee after his death to the wife and children of the said William, naming them, there could be no possible question but that William would take a life-estate, and his wife and children would take the fee; nor do we think there can be any difference if, instead of naming them, the will described them as the wife and children, stating that they should take, one-third to the wife, and the two-thirds to go to the children in equal shares, or, if it described them as the heirs who would inherit from William, in the same proportion as the law would cast it upon them. Certainly, there can be no difference whether the testator make such disposition of his property in one or in separate items, so it be clearly expressed. In item 10 of the will under consideration the intention of the testator is clearly expressed to be that William take only a life-estate, and a separate and distinct devise of the remaining fee at his death to the heirs of William in the same proportion they would have inherited had William owned the same in fee. It is clearly expressed that such heirs shall not take by descent from William, but by purchase from the testator. This being clearly expressed by the will, the rule in Shelley's Case does not apply. See Mining Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. Rep. 202. Where it clearly appears that the testator did not intend to grant a fee, then the devise will not be so construed as to vest one. Allen v. Craft, 109 Ind. 476, 9 N. E. Rep. 919. The will provides that the appellant shall pay his portion of the legacy given to the granddaughter Harriet Cook, and makes it a charge against the land. There was no error in sustaining the demurrer to the complaint. Judgment affirmed, with costs.

SILVA v. HOPKINSON et al.

(41 N. E. 1013, 158 Ill. 386.)

Supreme Court of Illinois. Oct. 11, 1895.

Appeal from superior court, Cook county; W. G. Ewing, Judge.

Bill by Evangeline S. Hopkinson and Emma H. Bowers against Frank P. Silva. Complainants obtained a decree. Defendant appeals. Affirmed.

F. S. Moffett, for appellant. Lackner & Butz, for appellees.

WILKIN, J. Frank P. Silva, the appellant, on January 23, 1893, entered into a contract with Evangeline S. Hopkinson and Emma H. Bowers, appellees, to purchase from them certain real estate in Chicago,—lot 9 of the subdivision of lots 15, 21, 22, 23, and 24 of Hopkinson's resubdivision of lots 4, 8, 9, and 10 in block 13 of the Blue Island Land & Building Company's subdivision, known as "Washington Heights," as said subdivision is recorded in the recorder's office of Cook county. Silva, upon examining the abstract of title to the property, refused to comply with the contract, on the ground that the fourth clause of the will of William Hopkinson, deceased, by virtue of which appellees claim title to the premises, did not vest the fee absolutely in them, and therefore they could not convey a perfect title to him. Appellees thereupon filed their bill in the superior court of Cook county to compel a specific performance of the contract. A demurrer was interposed to the bill on the grounds above set forth, which was overruled. Defendant electing to stand by his demurrer, the court entered a decree in accordance with the prayer of the bill, and the cause is brought to this court on appeal.

The fourth clause of said will is as follows: "After the death of my said wife, Jane Hopkinson, I give and devise and bequeath all of my estate, both real and personal, of which I may be possessed, with all or any right, title, or interest in lands or personal property I may acquire after the date of this will, to my only two children, Evangeline Sarah Hopkinson and Emma Jane Hopkinson, to be equally divided, share and share alike, and to their lawful heirs; but, in the event of their death without issue, then and in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of either one of my daughters the surviving one to inherit the portion of the deceased sister, if she dies without issue." Appellant insists that the title in appellees is subject to be defeated in the event of their dying without issue. Stopping with the sentence, "and to their lawful heirs," the devise to the daughters is an estate of freehold, with a gift to their lawful heirs in fee; and under the rule in Shelley's Case the word "heirs" is one of limitation of the estate, and not of purchase, and the daughters would take the fee. Baker v. Scott, 62 Ill. 87; Riggin v. Love, 72 Ill. 553; Carpenter v. Van Olinder, 127 Ill. 42, 19 N. E. 868; Hageman v. Hageman, 129 Ill. 168, 21 N. E. 814; Fowler v. Black, 136 Ill. 363, 26 N. E. 576; Vangieson v. Henderson, 150 Ill. 119, 36 N. E. 974. But counsel for appellant says, in determining what construction shall be put upon this will, we must ascertain the intention of the testator, as he has in and by his will expressed it. This is a frequent objection to the rule referred to, but no principle of law is better established than that, although the testator did intend the first taker to have but a life estate, yet, if the technical words are used, that intention, be it ever so clearly expressed, will be defeated, and the first devisee allowed to take the whole estate. Carpenter v. Van Olinder, Fowler v. Black, and Vangieson v. Henderson, supra. The only method in which an instrument employing the word "heirs" can be shown not to be within the rule is by showing that the word was not employed in its strict legal sense. Carpenter v. Van Olinder, supra. And therefore, unless the subsequent language in the foregoing clause of the will: "But, in the event of their death without issue, then and in such an event, if the executors can dispose of the property to advantage, to sell immediately, or within two years from the date of their decease; but in case of the death of one of my daughters the surviving one to inherit the portion of the deceased sister, if she dies without issue,"—shows that the testator used the words "lawful heirs" in some other than the technical sense, the question of intention does not arise in the case. It is also well settled that the words must be given their legal effect, even though the subsequent words are inconsistent therewith, unless they make it clear that they were not so used. Griswold v. Hicks, 132 Ill. 494, 24 N. E. 63, and authorities there cited. The subsequent language in this will falls far short of making it clear that the testator used the word "heirs" in other than their legal sense. There would seem to be, from the whole language of the clause, no greater reason for saying that by the word "heirs" he meant issue than for saying that by the subsequent word "issue" he meant heirs. We are of opinion then that the devise is within the rule, and that a fee-simple title is vested in appellees. This disposes of the contention that by the clause of the will in question an executory devise was made. The daughters, taking the fee, have the absolute power of disposition, and no executory devise can in such case exist. Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751. The judgment of the superior court will be affirmed. Affirmed.

DEFREESE v. LAKE et ux.

(67 N. W. 505.)

Supreme Court of Michigan. May 26, 1896.

Error to circuit court, Shiawassee county; Charles H. Wisner, Judge.

Action by Aaron Defreese against John A. Lake and Mary Lake. Judgment for plaintiff, and defendants bring error. Reversed.

Watson & Chapman, for appellants. John T. McCurdy, for appellee.

HOOKER, J. One Peter Casler, being owner in fee of the premises in controversy, made a will which contained the following provisions: "I give and bequeath to my wife, Betsey Casler, all the west half of the southeast quarter, and the south half of the east half of the southeast quarter, except so much of said land on the south as will make forty acres, on section thirty-one, according to the original survey of the United States, being in the township of Shiawassee, county of Shiawassee and state of Michigan, it being the same farm on which I now reside. After her decease the said real estate above described I give and bequeath to Henry Casler, my son, and after his decease said real estate to belong to his heirs." It appears that, during the time that Betsey Casler occupied the land, it was assessed for taxes to her for the years 1874 and 1875. It was sold for these taxes, and tax deeds were executed to Henry Casler on December 9, 1876, and December 13, 1877. After the testator's death his widow, Betsey Casler, entered and occupied the premises until her death, which occurred in September, 1877. Afterwards Henry Casler entered and held possession until November 7, 1879, when he conveyed the premises to John L. Lake by warranty deed. Mary Lake is the wife of John Lake, and, at the time this action of ejectment was brought against them, resided with him upon the premises. Henry Casler died September 15, 1886, leaving issue. The plaintiff claims title to the land in question under quitclaim deeds obtained from the descendants of Henry Casler, executed and delivered before his death; also, a quitclaim deed purporting to have been given by other persons, styling themselves "heirs at law of Peter Casler, deceased," dated after Henry's death. Some of them were admitted to be heirs at law of Henry Casler. Thus we find the plaintiff claiming title, and a right to recover the premises, by virtue of a deed from Henry Casler's heirs, while the defendants are in possession, claiming under a deed from Henry Casler himself. The plaintiff contends (1) that Henry Casler took only a life estate, with remainder to his heirs; (2) that the purchase of the lands at tax sale inured to the benefit of the remainder-men, and title, as against them, cannot be claimed under such deeds. On the other hand, the defendants say that Henry Casler took title in fee simple, under the will, and that, failing in that, his tax deeds gave him such title.

The will has been quoted. It conveyed a life estate to Betsey Casler, with remainder to her son Henry. So far there can be no dispute. Was this a remainder in fee simple? Obviously, this must depend upon the construction to be given to the words, "I give and bequeath to Henry Casler, my son, and after his decease said real estate to belong to his heirs." Does this language evince an intention upon the part of the testator to limit Henry's interest to an estate for life? If the intention had been to devise an estate in fee simple, the most apt and proper words would have been, "I give and devise to Henry Casler, my son, his heirs and assigns forever." An equally effective and perhaps common method of expression would be "I give and devise to Henry Casler, my son," the law in such case supplying the necessary words to create the estate in fee simple. But this testator used neither expression, but added to the devise to Henry the provision that after his decease "said real estate should belong to his heirs,"—words which necessarily imply that Henry Casler was to have only a life estate, if they are not to be treated as superfluous. We are not without precedents in this state which warrant the conclusion that this devised a life estate. Fraser v. Chene, 2 Mich. 81, construed a will in which the following language was used: "I give and bequeath to my beloved son Gabriel Chene, my eldest, the farm I now reside on, for and during his lifetime, with all the appurtenances thereon; and after he, my said son, the said Gabriel Chene, is deceased, then the right, title, and appurtenances of the aforesaid farm is to become the property of said Gabriel Chene's male heirs." The court said, "It would seem to any one reading the will in this case that the intention of the testator to give a life estate only to his son Gabriel was so very plain that it could not be doubted." In the case of Gaukler v. Moran, 66 Mich. 354, 33 N. W. 513, the testator devised premises to a daughter "during her natural lifetime, and after her death to her heirs and assigns." This was held to give the daughter a life estate merely. See, also, Cousino v. Cousino, 86 Mich. 323, 48 N. W. 1084; Jones v. Deming, 91 Mich. 481, 51 N. W. 1119. We are of the opinion that the words used indicated a plain intention to give to Henry Casler a life estate only. This being so, the statute (2 How. Ann. St. § 5544) applies, and the heirs of Henry Casler take as purchasers. This may seem at variance with the case of Fraser v. Chene, supra, but it is not, as the will in that case antedated the statute.

One Hartwell testified on behalf of the defendant that he drew the will, and that he had a conversation with the testator, at the time the will was drawn and executed, in regard to the provision hereinbefore mentioned, and that he understood the testator to wish Henry to have the land "in his own name, free"; that the witness "was in doubt, some, how to word the will, as it was new business

to him"; and that "he asked the testator particularly what he wished,—how he wished the estate disposed of after his death,—whether Henry was to be allowed to use it all, or keep it in trust," and he said: "'It is no matter. Henry will not have anything left, any way. It is all for Henry.' Q. Did you understand you were creating a fee simple? A. Yes, sir. Q. By the use of those words? A. Yes, sir." This testimony was afterwards stricken out, on motion of plaintiff's counsel, upon which error is assigned. There was no ambiguity on the face of the instrument, and the testimony was not admissible. Fraser v. Chene, supra; Kinney v. Kinney, 34 Mich. 250; Waldron v. Waldron, 45 Mich. 354, 7 N. W. 894; Forbes v. Darling, 94 Mich. 625, 54 N. W. 385.

It being settled that Henry Casler's title to the premises, acquired through the will, terminated at his death, we will next consider the question of the tax titles. It will be remembered that he procured a tax deed of the premises before the termination of Betsey Casler's estate. These taxes were properly assessed to Betsey Casler, who owed the duty of payment, both to the state, and to the remainder-men. Jenks v. Horton, 95 Mich. 13, 55 N. W. 372; Smith v. Blindbury, 66 Mich. 319, 33 N. W. 391. But Henry Casler was in a different situation. He certainly owed no duty of payment to the state, though his interest in the premises was liable to sale therefor. It is a general proposition that a life tenant to whom taxes are assessed, and upon whom the law imposes the burden of such taxes, cannot acquire the title in fee by allowing the premises to be sold for taxes, and bidding them in, thus cutting off the remainder-man. But in this case Henry Casler was not a life tenant in possession, and, so far as the record shows, he had not done anything tending to show whether or not he had accepted the devise prior to the time he obtained his tax deeds, which manifestly he was under no obligation to do unless he chose. 2 Redf. Wills, 304, and cases cited; Doe v. Smyth, 6 Barn. & C. 116; 4 Kent, Comm. 534; Townson v. Tickell, 3 Barn. & Ald. 31; 2 Story, Eq. Jur. §§ 1075–1079. In 3 Washb. Real Prop. 6, the author says, "An heir at law is the only person who, by common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect." Again, at page 542, the author says, "It is hardly necessary to add that no one can make another the owner of an estate against his consent, by devising it to him, so that if the devisee disclaim the devise it becomes inoperative and goes to the heir." It is said that a parol disclaimer will not prevent the devisee from subsequently claiming the devise, and that the reason of the necessity of a deed grows out of the presumptive vesting of the devised interest in the devisee before entry. See Perry v. Hale, 44 N. H. 365. It is, in our opinion, illogical to say that a deed is necessary because of the presumption that the title has vested, when the title does not vest by a devise unless there is an acceptance. It would seem that the deed would be necessary only where the title had actually vested, which appears to depend upon acceptance. If it be admitted that the law will presume an acceptance, it is not a conclusive presumption, and, when it is shown to have been renounced, it is shown that the title did not vest, and apparently there would be no occasion for divesting a title that had not vested. There are two classes of cases in which it may become necessary to determine what constitutes a renunciation or acceptance: (1) Cases where the devisee or his privies are denying renunciation; and (2) where they are asserting it. In the former (i. e. before the devisee can be deprived of the estate) there are cases that hold that renunciation is not to be lightly inferred, and that equivocal acts will not do, and it has been contended that a deed is necessary when the devise is of an absolute and unconditional fee. On the other hand, if the devisee or his privies are asserting renunciation, or, what is equivalent, denying acceptance, it has been said that "the presumption of assent is never conclusive; neither are acts which indicate an intention to accept." Wheeler v. Lester, 1 Bradf. Sur. 293; Perry v. Hale, supra. But an entry and occupation under the will have been considered the most satisfactory evidence of acceptance, in cases where action has been brought against the devisee, where the devise was subject to the payment of debts. Pickering v. Pickering, 6 N. H. 120; Glenn v. Fisher, 6 Johns. Ch. 34; Kelsey v. Western, 2 N. Y. 501. In this case the devisee is dead, and his grantee sets up the claim that he entered and occupied the premises under another title; i. e. a tax title acquired after the devise, but before the end of the preceding estate. There is no other evidence bearing upon the question of acceptance or renunciation, except the fact that he claimed title in fee, contrary to the terms of the devise, and we are asked to determine whether this was sufficient evidence of renunciation to go to the jury. In Doe v. Smyth, 6 Barn. & C. 112, the court said that a devisee cannot be compelled to accept the devised interest, but may by some mode renounce and disclaim it. "* * * And it is not necessary in the present case to decide whether such renunciation and disclaimer may be by parol, because, in whatever form they are made, we think they must be a clear and unequivocal disclaimer of any estate in the land. In this case the disclaimer is not of any estate in the land, but only of benefit under the will, accompanied in every instance by an assertion of a right to the land by a higher and better title. This proceeded on a mistake of which the devisee (the lessor of the plaintiff), though slowly and reluctantly, was at last convinced. No case similar to this was cited, or has been

found, and we therefore think the lessor of the plaintiff is not precluded from acting under her improved judgment, and taking the land as devisee under the will." Here the devisee was denying renunciation, and her contention was sustained. Whatever we may think of the holding that a disclaimer of a devise is not good unless it goes to the extent of disclaiming any interest in the land, although such claim may be based upon other and better title, it must be conceded that the case turned upon that, or that, at all events, it did not decide that a disclaimer must be by deed. This case was decided in 1826. The case of Bryan v. Hyre, 1 Rob. (Va.) 102, decided in 1842, affirmed a case where the trial judge had instructed the jury that a disclaimer of a devise must be in writing. This is based upon the rule laid down in Coke upon Littleton,—that where a devisee enters the freehold is in him before he enters, and in that case the heir takes nothing. Co. Litt. 111a. The case of Townson v. Tickell was cited, but it does not decide the point, for there the disclaimer was in writing. The decision really rests upon Doe v. Smyth, 6 Barn. & C. 112, which, as has been shown, did not pass upon the question. Indeed, that case (i. e. Doe v. Smyth) seems to have overlooked the earlier case of Townson v. Tickell, 3 Barn. & Ald. 31, decided in 1819. The Virginia case mentions it to disapprove the opinion of Holroyd, J., where he says: "I think that an estate cannot be forced on a man. A devise, however, being prima facie for the devisee's benefit, he is supposed to assent to it, until he does some act to show his dissent. The law presumes that he will assent, until the contrary be proved. When the contrary, however, is proved, it shows that he never did assent to the devise, and consequently that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to show that he did not assent to the devise. Unless some strong authority were shown to that effect, I cannot think that the law requires either of these forms. I am confirmed in that opinion by the case of Bonifaut v. Greenfield, Cro. Eliz. 80." In that case the renunciation was by deed, and it was claimed that was insufficient, and that a disclaimer in a court of record was necessary. All of the judges agreed that the disclaimer by deed was good, and the dictum contained in the opinion of Holroyd was apparently approved by the other justices. So far, then, we have dictum against dictum, in the English cases, with the Virginia case holding a writing necessary. The question was up in Massachusetts in the same year that Doe v. Smyth was decided (i. e. 1826). Stebbins v. Lathrop, 4 Pick. 43. It was there held that nothing short of an express renunciation could be taken notice of by a court of probate. The court said: "Nothing appears amounting to a renunciation. But, if this were doubtful, the question is not to be settled in the court of probate. The respondent has a right to be heard on this point in a court of law, and he cannot be so heard if the grant of probate should be revoked. The most that appears at present is an intention to renounce, and even this is not very clear. It is possible that the intention was merely to impede the creditors in the collection of their debts. Until the legatees shall actually renounce their legacies, their assent to the provisions of the will which are apparently beneficial to them will be presumed. Townson v. Tickell, 3 Barn. & Ald. 31. If they should persist in the intention to renounce the estate, the probate of the will will not restrain them. And then the question will be fairly raised whether this can be done to the prejudice of creditors. This being the light in which we view this point, it will not be necessary to determine whether the acts of the devisees will in law amount to a renunciation. It is sufficient to justify the proceedings of the judge of probate in this particular that these acts, taken together,—especially the acts of Miner Stebbins,—are equivocal, and that nothing short of an express renunciation can be taken notice of in a court of probate. And there seems no good reason why the fact should not be verified by the record, when the parties are present and may renounce if they are so inclined. No doubt a devisee may disclaim by deed the estate devised, as was decided in the case of Townson v. Tickell, 3 Barn. & Ald. 31; and perhaps he may disclaim without being subjected to the expense and trouble of executing a deed, as Holroyd, J., seemed to think. But it does not follow that a court of probate shall receive evidence of such disclaimer, and most certainly not when the evidence relates to acts of a doubtful bearing. In the case of Proctor v. Atkyns, 1 Mass. 321, it was decided that a court of probate could not determine upon a claim set up by deed, because it was determinable exclusively at the common law. The same reason applies with force to the supposed disclaimer in this case." In Webster v. Gilman, 1 Story, 499, Fed. Cas. No. 17,335, the following appears: "It may be even doubtful whether, under our laws, any renunciation or disclaimer not by deed or matter of record would be an extinguishment of the right of the devisee. But at all events it should be evidenced by some solemn act or acknowledgment in writing, or by some open and positive act of renunciation or disclaimer which will prevent all future cavil, and operate, in point of evidence, as a quasi estoppel." Here, again, the question was not decided. The question was before the United States circuit court again in Ex parte Fuller, 2 Story, 330, Fed. Cas. No. 5,147, and again it was not passed upon. The court said: "As to the other point, there is no doubt that the devisee must consent, otherwise the title does not vest in him. But where the estate

is devised absolutely, and without any trust or incumbrances, the law will presume it to be accepted by the devisee, because it is for his benefit; and some solemn, notorious act is required to establish his renunciation or disclaimer of it. Until that is done, stabit presumptio pro veritate. That is sufficiently shown by the case of Townson v. Tickell, 3 Barn. & Ald. 31, cited at the bar, and the still later case of Doe v. Smyth, 6 Barn. & C. 112. Brown v. Wood, 17 Mass. 68, and Ward v. Fuller, 15 Pick. 185, manifestly proceeded upon the same foundation. Now, in the present case, there is no pretense to say that Ross has ever renounced or disclaimed the estate devised to him. The statement of fact is that he has done no act accepting or declining the devise. If so, then the presumption of law is that he has, by implication, accepted it, since it gives him an unconditional fee." The case of Ward v. Fuller, 15 Pick. 185, went no further than to hold that a devisee before entry had a sufficient seisin to maintain a writ of right. In 4 Kent, Comm. p. 534, it is said that: "An estate vests, under a devise, on the death of the testator, before entry. But a devisee is not bound to accept of a devise to him nolens volens, and he may renounce the gift, by which act the estate will descend to the heir, or pass in some other direction under the will. The disclaimer and renunciation must be by some unequivocal act, and it is left undecided whether a verbal disclaimer will be sufficient, and some judges have held that it may be by a verbal renunciation. Perhaps the case will be governed by circumstances." See, also, Perry v. Hale, 44 N. H. 364.

From the foregoing, we conclude that an acceptance should be presumed in this case, which presumption may be overthrown by acts inconsistent with acceptance. The only evidence here is the purchase of tax titles, and procuring and recording tax deeds of the premises, and the conveyance, by full warranty deed, within two years after Betsey Casler's death, of the premises devised. The inference is strong that Henry Casler's design in obtaining the deeds was to acquire a better title than that conveyed by the will, either because of some inherent defect in the latter, or from a desire to obtain the fee. There is perhaps room for the suspicion that his mother, Betsey Casler, permitted this, as the plaintiff's counsel contends, or that Henry accomplished it without her knowledge, but in either case it tended to show a desire to obtain a better title than he then had. It does not necessarily follow that he was willing to disclaim a valid life estate for his chances under a tax title which, if invalid, might compel him to share his life estate with his brothers and sisters. Again, the testimony of the witness Bear that he found the land advertised in the paper, and bid it in, tends to show that the sale was not the result of collusion or fraud, and that Henry Casler obtained the tax title from Bear to protect his mother as well as himself. This testimony should not have been stricken out upon plaintiff's motion. If the son, Henry Casler, never accepted the devise, it is an end of the case upon this record, entitling the defendants to a verdict, inasmuch as the tax deeds are prima facie valid, and conveyed the fee.

But, if Henry Casler accepted the devise, it becomes necessary to inquire whether he can set up his tax deeds against the remainder-men. This is said to depend upon the question whether he owed a duty to them to pay the taxes, or preserve the estate for them, analogous to the duty which his mother owed to him and them. We have found no case upon all fours with this, and we doubt if it can be said that the law imposes any such duty upon the second life tenant, during the tenancy of his predecessor, but we think it does not necessarily turn upon a duty to pay. While he was under no obligation to preserve the estate, if he chose to do so that he might reap the benefit of the devise, he should be content to look to the occupant, whose duty it was to pay them, for reimbursement, or, if not, he could expect no more than contribution from the other remainder-men, to whose benefit, as well as his own, such payment inured. It would be inequitable to permit him to claim title under such circumstances, where he took under the same will that gave him an estate, thereby recognizing their right. Good faith towards the testator should forbid such an attempt to defeat his purpose. Were this claim to be sustained, it would make it easy for two life tenants, by collusion, to defeat the remainder-men, under circumstances like these. It may be said that this could be done by the mere disclaimer, but this is a mistake. See How. Ann. St. § 5548. We are cited to Blackwood v. Van Vleit, 30 Mich. 118, and Sands v. Davis, 40 Mich. 14, to sustain the claim that Henry Casler was under no disability as a claimant of the fee under the tax deed. The former was a case where one who went into possession before the tax levy was held not to be precluded from making and relying upon a purchase of land at tax sale. In Sands v. Davis the question arose between tenants in common. In that case one bought a tax title that was outstanding at the time of the purchase of his interest in the premises, and therefore which he owed no duty, to the state or his co-tenants, to pay, and it was held that he might set up such title against his co-tenants. Both of these cases recognize the proposition that one asserting a tax title may be under a disability, owing to his relations to others claiming interests in the land. In Blackwood v. Van Vleit it is said, "It was not claimed in the case, so far as the record shows, that there were contract or other relations between Blackwood and Van Vleit that would preclude the latter from buying the former's land for delinquent taxes." In

Sands v. Davis, Campbell, C. J., uses the following language: "If Sands had gone into possession by the aid of the other tenants, or in recognition of their rights, he might in that way, perhaps, have incurred some duties towards them. But he went in as a stranger to their claims, under a claim which denied their existence or validity. He became liable to an action of ejectment the moment he assumed possession. We see, therefore, no reason why he could not then or thereafter, as well as he could have done it before, purchase a title which was at that time adverse to the holders of the whole original title. The case of Blackwood v. Van Vleit, 30 Mich. 118, holds, in conformity with these views, that there can be no estoppel against purchasing tax titles, except against one who had a duty to pay the tax or remove the burden." There is abundant authority that a tenant in common, whose duty it is to pay a portion of the taxes, cannot acquire a title, as against his co-tenant, by purchase at a tax sale for the entire tax. Dubois v. Campau, 24 Mich. 360, and notes. Wood, Landl. & Ten. § 54, says, "In the absence of any reservation of rent, or other provision in the lease or conveyance providing therefor, a tenant for life, as between himself and the reversioner, is bound to pay the taxes assessed upon the premises; and if he fails to do so, and they are sold therefor, and the tenant becomes the purchaser, he cannot claim a title in fee against the reversioner." See, also, Cairns v. Chabert, 3 Edw. Ch. 312; Smith v. Blindbury, 66 Mich. 323, 33 N. W. 391; Patrick v. Sherwood, 4 Blatchf. 112, Fed. Cas. No. 10,804; McMillan v. Robbins, 5 Ohio, 28; Pike v. Wassell, 94 U. S. 711; Sidenberg v. Ely, 90 N. Y. 257; Varney v. Stevens, 22 Me. 331; Prettyman v. Walston, 34 Ill. 175; Hitner v. Ege, 23 Pa. St. 305. Some of these cases hold that where the life tenant is compelled to make permanent betterments, or to pay off incumbrances to prevent a forfeiture, he may enforce contribution against the remainder-men, to the extent of their interest in the land. Cairns v. Chabert, 3 Edw. Ch. 312; Foster v. Hilliard, 1 Story, 77, Fed. Cas. No. 4,972; Daviess v. Myers, 13 B. Mon. 512; Bell v. New York, 10 Paige, 49; Estabrook v. Hapgood, 10 Mass. 313; Atkins v. Kron, 8 Ired. Eq. 1. Thus it appears that while the life tenant in possession may be under no legal obligation to pay an incumbrance, and therefore owes no duty to the remainder-man, if, to prevent a forfeiture of his estate, he does pay it, he has a claim against the interest of the remainder-man. Either party may buy in the incumbrance, but cannot hold it to the exclusion of the other, who is willing to contribute his share of the amount paid for the purchase. See cases cited, and Insurance Co. v. Bulte, 45 Mich. 122, 7 N. W. 707; Whitney v. Salter (Minn.) 30 N. W. 755. In this case it was not clear that any portion of the incumbrance was chargeable to the life tenant, yet it was said that he should be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman,—citing 1 Washb. Real Prop. 96; Biss. Est. 26; Law Lib. 248; Cooley, Tax'n (2d Ed.) 500–509. We see no reason why this doctrine should not apply equally to the devisee of a life estate not in possession, and can see no difference in principle. And we think the rule as applicable to taxes as to any other incumbrance. Therefore we think the right to assert these deeds against the remainder-men hinges on the acceptance or renunciation by Henry Casler of the devise.

Counsel for defendants attack plaintiff's title, claiming that the quitclaim deeds given by the heirs of Henry Casler before his death conveyed no interest, for the reason that there "are no heirs to the living." But the statute is a sufficient answer. The remainder was a future estate, which the statute (How. Ann. St. § 5531) declares to be descendible, devisable, and alienable in the same manner as estates in possession.

Counsel also contend that the devise is void under How. Ann. St. § 5531, which reads as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section." We think that statute has no application, for the power of alienation was suspended for the period of two lives in being only, viz. Betsey Casler and Henry Casler. See, also, section 5535.

Plaintiff's title is also attacked upon the ground of want of jurisdiction in the probate court to admit the will to probate, but we think this question is foreclosed by the stipulation that said will was duly probated, etc.

There is a further question in the case which is discussed by counsel for the defendants. There is nothing to show that the will was ever recorded, while the tax deeds were promptly placed upon record. The latter fact has significance upon the subject of renunciation, because, if Henry Casler was claiming under the will, there was no occasion for his recording such deeds. Again, the defendants are not shown to have had any actual or constructive notice of the will, or the rights of any of the parties under it. He was therefore apparently a bona fide purchaser, relying upon the record of the tax deeds, which was the only title appearing of record, in Henry Casler.

As foreshadowed, our conclusion is that it was a question for the jury to determine, whether Henry Casler accepted or renounced the devise, and that it was error to direct a verdict for the plaintiff. The judgment will be reversed, and a new trial ordered.

LONG, C. J., and GRANT and MOORE, JJ., concurred. MONTGOMERY, J., concurred in the result.

HOPKINS v. HOPKINS.

(Cas. t. Talb. 44.)

Court of Chancery. 1734.

The testator, Mr. Hopkins, by his will, devises his real estate to trustees and their heirs, to the use of them and their heirs, in trust for Samuel Hopkins (the plaintiff's only son, which plaintiff is heir at law to the testator) for life; and from and after his decease, in trust for the first and every other son of the body of the said Samuel, lawfully to be begotten, and the heirs male of the body of every such son; and for want of such issue, in case the said John Hopkins, the plaintiff, should have any other son or sons of his body lawfully begotten, then in trust for all and every such son and sons respectively and successively, for their respective lives, with the like remainders to their several sons, with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of the said Samuel Hopkins; and for want of such issue, in trust for the first and every other son of the body of Sarah, the said John Hopkins' eldest daughter, lawfully to be begotten, with like remainders to the sons of John Hopkins' other daughters; and for want of such issue, then in trust for the first and every other son of his cousin Anne Dare (wife of Francis Dare) lawfully to be begotten, with like remainders to the heirs male of the body of every such son of the said Anne Dare; and for default of such issue, then in trust for his own right heirs forever. Then come two provisos; the one whereby every person that should come into possession of his estate, was to take his name, and bear his arms; the other is in these words: "Provided also, and it is my will, that none of the persons, to whom the said estates are hereby limited for life, shall be in the actual possession thereof, and in the enjoyment of the rents and profits, or of any greater or other part thereof, than as hereinafter is mentioned, until he or they shall have respectively attained his or their ages of twenty-one years; and in the mean time, and until his or their attaining to such age, my trustees and their heirs and executors shall make such allowances thereout, for the handsome and liberal maintenance and education of such person and persons respectively, as they shall think suitable and agreeable to his estate and fortune; and it is my will, that the overplus of the said rents and profits, over and above the annual allowances, or such part thereof as shall remain after all my debts, legacies, and funeral expenses shall be first paid (with the payment whereof I have charged my real estate, in case my personal estate shall not be sufficient for those purposes), do go to such persons as shall first be entitled unto, or come into the actual possession of my said real estate, according to this my will."

Samuel Hopkins died in the testator's lifetime, without issue; and some time after, the testator died without any alteration made of his will; nor had John Hopkins any other son; nor were any of the other remaindermen in esse at the testator's death, except Dare, son of Anne Dare.

The first question was, whether by Samuel's death in the testator's lifetime, the several limitations between him and Dare were not become void; there being no particular estate to support them as remainders, by reason of Samuel's death in the testator's lifetime, who was to take the first estate; nor nobody capable of taking at the testator's death but the son of Anne Dare, who thereby claimed the whole interest presently? Or whether these intermediate limitations should not inure by way of executory devise to any other son he might hereafter have?

The second question was, in case the limitation to the other sons of John Hopkins was to be looked upon as an executory devise, what should become of the rents and profits in the mean time?

The cause was first heard at the rolls, and there decreed to be an executory devise.

Serjeant Eyre and Peere Williams, for plaintiff. The Attorney General, The Solicitor General, Mr. Verney, Mr. Fazakerley, Mr. Bootle, and Mr. Strange, contra.

TALBOT, Lord Ch. Two questions have been made upon this will: The first is, whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise? or whether it shall be taken as a contingent remainder, and consequently void for want of a particular estate to support it, by reason of Samuel's death in the testator's lifetime, and that John Hopkins had no son in esse at the testator's death, in whom the remainder might vest? The next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until John Hopkins has a son? As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed, that if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder, by reason of Samuel's estate, which would have supported it. So is the case of Purefoy v. Rogers, 2 Saund. 380, 388, and limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders. So on the other hand, it is likewise clear, that had there been no such limitation to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and consequently not able to inure as a remainder; so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And as to that, I am of opinion that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or feme covert make a will, and do not act either at full age or after the coverture determined, to revoke this will, yet the will is void, because the time of making is principally to be considered; and the law judges them

incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death, no after-purchased lands shall pass without a republication, which was the case of Bunter v. Cook, 1 Salk. 237, because the time of the will made is chiefly to be regarded. Indeed it is possible that subsequent things may happen to alter the testator's intent; but unless that alteration be declared, no court can take notice of his private intent, not manifested by any revocation of the former; though these subsequent accidents may and must, in many cases, have an operation upon the will; as in the case of Fuller v. Fuller, Cro. Eliz. 422, and Hutton v. Simpson, 2 Vern. 722. And in the Lord Landsdown's Case, 10 Mod. 96, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will made and the testator's death; and the words there, for want of such issue, were not construed to create another estate tail to postpone the limitation, but only to convert the second estate to the precedent limitation. So we see, that in these cases the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired; but to let it work as far as it can. And if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son; but if it is taken as a remainder, the intent plainly appearing that a second son of John Hopkins should take, is quite destroyed; there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent (Doe v. Fonnereau, 2 Doug. 487), as far as possible; and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature, that have been adjudged. And if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In Pay's Case, Cro. Eliz. 878, had the testator lived to Michaelmas, the limitation had been a remainder; and if a remainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where by the testator's death before Michaelmas, what would otherwise have been a remainder, was held to be good by way of executory devise? I think, that in this case the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same.

The next question is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth of a son to John Hopkins? And this must depend upon the wording of the proviso. The words are: "That none of the persons to whom the estates are limited shall be in the actual possession and enjoyment of the rents and profits until they shall respectively attain the age of twenty-one; and that in the mean time the trustees shall make such allowance thereout as they shall think suitable; and then he wills, that the overplus of such rents and profits do go to such persons as shall be entitled unto, and come to the actual possession of his estate," &c. By which words none are affected but such as are to come to the estate under the limitations. It restrains them from having anything to do with the estate till they attain the age of twenty-one, and provides the surplus (beyond their allowance) to be laid up for them; but here is no provision made what shall become of those rents and profits until a son be born. The words in the mean time have been differently construed; and it was said, that there was no certain terminus a quo, from whence they should begin. Had Samuel lived, the terminus must have been from the time of the limitation taking place; and so it must be toties quoties any come to be entitled to this estate under the several limitations; but until somebody is in esse to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir-at-law; the case being the same where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir-at-law. So it was held by the Lord King in the case of Lord and Lady Hertford v. Lord Weymouth,— which shows that equity follows the law.

One objection indeed has been made, which is, that the testator having in this case devised another estate to John Hopkins, his heir-at-law, can never be supposed to have intended him this surplus. And to warrant that objection, the case of North v. Crompton, 1 Ch. Cas. 196, has been cited. I answer, that in these cases the heir does not take, by reason of the testator's intent being one way or the other; but the law throws it upon him: and wherever the testator has not disposed (be his intent that the heir should take or not take), yet still he shall take, for somebody must take; and none being appointed by the testator, the law throws it upon the heir.

And so affirmed the decree, and ordered the personal estate (which was of very great value) to be laid out in land, and settled to the same uses as the real estate, according to the direction of the will.

WYMAN v. BROWN et al.[1]

(50 Me. 139.)

Supreme Judicial Court of Maine. 1863.

D. D. Stewart, for demandant. G. W. Whitney, for tenants.

WALTON, J. * * * Another question raised in this case is, whether the deed from Mrs. Brown to Oliver S. Nay was valid. The objection to it is, that it purports to convey a freehold estate to commence in futuro; and such is its effect, for by its terms Mrs. Brown was "to have quiet possession, and the entire income of the premises until her decease."

Deeds in which grantors have reserved to themselves estates for life are believed to be very common in this state; and whether or not such deeds are valid is certainly a very important question, and ought to be authoritatively decided.

It was a principle of the old feudal law of England that there should always be a known owner of every freehold estate, and that the freehold should never, if possible, be in abeyance. This rule was established for two reasons: (1) That the superior lord might know on whom to call for the military services due from every freeholder, as otherwise the defence of the realm would be weakened. (2) That every stranger who claimed a right to any lands might know against whom to bring his suit for the recovery of them; as no real action could be brought against any one but the actual tenant of the freehold. Consequently, at common law, a freehold to commence in futuro could not be conveyed, because in that case the freehold would be in abeyance from the execution of the conveyance till the future estate of the grantee should vest. And it is laid down in unqualified terms in several cases in Massachusetts, and in one in this state, that an estate of freehold cannot be conveyed to commence in futuro by a deed of bargain and sale, which owes its validity to the statute of uses, and not to the common law.

But the doctrine, that freehold estates to commence in futuro cannot be conveyed by deeds of bargain and sale, since the passage of the statute of 27 Hen. VIII. c. 10, commonly called the "Statute of Uses," is clearly erroneous. It is clear that, at common law, such conveyances could not be made; and it is equally clear that, by virtue of the statute of uses, such conveyances may be made. Prior to the reign of Henry VIII., real estate could be so held that one person would have the legal title, and another the right to the use and income. To obviate many supposed inconveniences which had grown out of this practice of separating the legal title from the use, the statute of uses was passed, by which it was enacted that the estates of the persons so seized to uses should be deemed to be in them that had the use, in such quality, manner, form, and condition, as they had before in the use. It will be noticed that the effect of this statute was to annex the legal title to the use, so that they could not be separated. Mr. Cruise says, that when this statute first became a subject of discussion in the courts of law, it was held by the judges that no uses should be executed that were limited against the rules of the common law; but that this doctrine was not and could not be adhered to, for the statute enacts that the legal estate or seizin shall be in them that have the use, in such quality, manner, form, and condition, as they before had in the use; that chancery having permitted uses to commence in futuro and to change from one person to another, by matter ex post facto, the courts of law were obliged to admit of limitations of this kind. The statute did not attempt to limit or control the doctrine of uses; it simply declared that where the use was, there the legal estate should be also. The result was that it opened several new modes of conveying legal estates wholly unknown to the common law; for whatever would convey the use and income of real estate before its passage, would, by virtue of the statute, convey the legal estate afterwards. It will thus be seen that conveyances through the medium of the statute of uses are effected in this way: The owner of an estate in lands, for a consideration either good or valuable, agrees that another shall have the use and income of it, and the statute steps in and annexes the legal title to the use, and thus the cestui que use becomes seized of the legal estate in the same manner as before the statute he would have been seized of the use. The argument, presented in a syllogistic form, is this: Since the statute of uses, freeholds can be conveyed in any manner that uses were conveyed before its passage. Before its passage, uses were conveyed to commence in futuro; therefore, freeholds may be conveyed to commence in futuro since its passage. It must be remembered, however, that neither legal estates nor uses can be so limited as to create perpetuities. If future estates are so limited as to take effect in the lifetime of one or more persons living, and a little more than twenty-one years after, the rule against perpetuities will not be violated. We will refer to a few leading authors:

Mr. White, a very learned English writer, in one of his additions to the text of Mr. Cruise, says: "By executory devise and conveyances operating by virtue of the statute of uses, freehold estates may be limited to commence in futuro." 1 Greenl. Cruise, tit. 1, § 36.

Mr. Chitty, after stating that by a common law conveyance, a freehold to commence in futuro could not be conveyed, continues: "But deeds operating under the statute of uses, such as bargain and sale, covenant to stand seized, or a conveyance to uses, or even a devise, may give an estate of freehold to commence in futuro." 1 Chit. Gen. Prac. 306; 2 Bl. Comm. 144, note 6.

Mr. Sugden says: "A bargain and sale to the use of D. after the death of S, is good." Gilb. Uses (Sugd. Ed.) 163.

[1] Irrelevant parts omitted.

Mr. Cornish: "By a bargain and sale, or covenant to stand seized, a freehold may be created in futuro." Corn. Uses, 44.

Chancellor Kent: "A person may covenant to stand seized, or bargain and sell, to the use of another at a future day." 4 Kent, Comm. 298.

Mr. Archbold: "Deeds acting under the statute of uses, such as bargain and sale, covenant to stand seized, or a conveyance to uses, or even a devise, may give an estate of freehold to commence in futuro." Note to 2 Bl. Comm. 166.

In a note to the 5th American edition of Smith's Leading Cases (volume 2, p. 451), after noticing the Massachusetts cases, in which it is held that a freehold to commence in futuro cannot be created by a deed of bargain and sale, the learned editors say: "It is undoubtedly true that such limitations are bad at common law; but it seems equally well settled that they are good in deeds operating under the statute of uses, whether the use be raised on a pecuniary consideration or on blood or marriage. The point is so held in England, and has been repeatedly and expressly decided in New York, and several of the other states of this country. The attributes of a use are the same, whatever may be the consideration in which it is founded; and, if uses commencing in futuro were without the operation of the statute, when raised by a bargain and sale, they would be equally so when originating in a covenant to stand seized."

In Rogers v. Insurance Co., 9 Wend. 611, the question underwent a most thorough examination, and the conclusion was, that a freehold to commence in futuro could be conveyed by a deed of bargain and sale, operating under the statute of uses; and the court expressed surprise that any one should have ever supposed that such was not the law.

In Bell v. Scammon, 15 N. H. 381, the same question was raised, and the court held that "a freehold in futuro could be conveyed either by deed of bargain and sale, or by a covenant to stand seized."

Mr. Washburn, in his late very able work on Real Property (volume 2, p. 617, § 16), says that the reasoning of Chancellor Walworth, in Rogers v. Insurance Co., 9 Wend. 611, in which he maintains that an estate of freehold, to commence in futuro, can be conveyed by a deed of bargain and sale, and the authorities upon which he rests would seem to leave little doubt in the matter, beyond what arises from the circumstance that other courts have taken a different view of the law.

It is true, that, in Massachusetts and this state, when determining that the deeds then under consideration were valid upon other grounds, judges have expressed the opinion that a freehold to commence in futuro could not be conveyed by a deed of bargain and sale; but these opinions are mere obiter dicta, for they have never yet had the effect of defeating a deed. The idea seems to have originated in an unauthorized statement (probably accidental) to be found in Pray v. Pierce, 7 Mass. 381. Having under discussion the rule that deeds should be so construed as to give effect to the intention of the parties, and not to defeat it, the case of Wallis v. Wallis, 4 Mass. 135, was referred to by way of illustration, and the reporter makes the court say that the deed in the latter case was held to be a covenant to stand seized, "because, as a bargain and sale, it would have been a conveyance of a freehold in futuro and therefore void." By turning to that case (Wallis v. Wallis), it will be seen that such a statement is unauthorized. The court remarked that, by a common law conveyance, a freehold could not be conveyed to commence in futuro, which was unquestionably true; but the court did not say that such a conveyance could not be made by a deed of bargain and sale, which owes its validity to the statute of uses, and not to the common law. Why the deed in Wallis v. Wallis was not sustained as a bargain and sale, instead of covenant to stand seized, does not appear. The case was submitted without argument, and, as the deed could readily be sustained as a covenant to stand seized, it may not have occurred to the court that it could just as well be sustained as a bargain and sale. On careful examination, it will be seen that these cases (Wallis v. Wallis and Pray v. Pierce) are not authorities for the doctrine they are so often cited in support of.

In Welsh v. Foster, 12 Mass. 93, the deed, for a valuable consideration, to be paid whenever the deed should take effect, and not otherwise, purported to convey a certain part of a mill, with the land, &c., "provided that the said deed should not take effect or be made use of, until the said millpond should cease to be employed for the purpose of carrying any two mill-wheels." It was held that nothing passed by the deed, not because it was to take effect only upon the happening of a future event, but because the event, if it should ever happen, might be delayed much beyond the utmost period allowed for the vesting of estates on a future contingency. The event, it was held, must, in its original limitation, be such that it must either take place, or become impossible to take place, within the space of one or more lives in being, and a little more than twenty-one years afterwards, to prevent the creating of a perpetuity, or an unalienable estate. Such is undoubtedly the law. Besides, no consideration was ever paid for the deed, and the grantor afterwards conveyed to another. Under these circumstances the court very properly held the deed void. But the distinction made by Judge Jackson, in that case, between covenants to stand seized, and deeds of bargain and sale, is mere dictum, and has neither reason nor authority to rest upon.

Speaking of the qualities of a bargain and sale, Judge Jackson says: "One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use, from which it follows that a freehold to commence in futuro cannot be conveyed

in this mode; as that would be to make the bargainee hold to the use of another until the future freehold should vest." Hold what? Upon the execution of a deed in which the grantor reserves to himself an estate for life, and conveys the residue, the grantee obtains a present vested right to a future enjoyment of the property; but, until the future freehold vests, the use, the seizin, and the right of possession, remain with the grantor, and there is no conceivable thing that the bargainee will be required to "hold to the use of another."

Judge Jackson seems to have supposed that when such a deed is executed the legal estate or seizin passes immediately to the grantee, and that, until his own future freehold vests, he holds this legal estate, or ideal seizin, to the use of the grantor. But such a theory is wrong, and contrary to every authority we have been able to find. In fact, under the statute of uses, such a theory, which separates the legal estate from the use, cannot be correct; for, by the very terms of the statute, the lawful seizin, estate, and possession, shall be deemed and adjudged to be in him that hath the use, to all intents, constructions, and purposes in law; and is made applicable to "any such use in fee simple, fee tail, for life, or for years." "The seizin remains in the person creating the future use till the springing use arises, and is then executed to this use by the statute." 2 Washb. Real Prop. 282. "If raised by a covenant to stand seized, or bargain and sale, the estate remains in the covenantor or bargainor until the springing use arises." Gilb. Uses (Sugden's note) 163. A person may covenant to stand seized, or bargain and sell, to the use of another at a future day. In such a case "the use is severed out of the grantor's seizin." 4 Kent, Comm. 298. "Here is a conveyance to the bargainee to take effect at the decease of the bargainor, which creates a resulting use to the latter during life, with a vested use in remainder to the bargainee in fee, both uses being served, in succession out of the seizin of the bargainor." Jackson v. Dunsbah, 1 Johns. Cas. 96.

The rule, that a bargain and sale must be to the use of the bargainee, and not to the use of another, applies to only so much of the estate as is bargained for, and not to the residue, which is not bargained for and not paid for; and the rule is not violated, and there is nothing inequitable or repugnant to the grant, in requiring him to wait for the enjoyment of the property till such time as, by the express terms of the deed under which he claims, he is entitled to it.

It will be noticed, that Judge Jackson assumes the existence of a rule, that one use cannot be limited upon another, and that it would be a violation of this rule to give effect to a deed of bargain and sale of a freehold, to commence in futuro. Such a rule does exist in England. Mr. Watkins, in his introduction to his very able work on conveyancing, says, that "about the time of passing the statute of uses, some wise man, in the plenitude of legal learning, declared there could not be an use upon an use; and that this very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted." And Lord Hardwicke, in Hopkins v. Hopkins, 1 Atk. 591, says, that by this means, a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Mr. Williams, in his work on Real Property (page 124), says this rule has much of the technical subtilty of the scholastic logic which was then prevalent. Lord Mansfield calls it "absurd narrowness." 2 Doug. 774. Blackstone calls it a "technical scruple;" and Mr. Sugden, in a note to Gilb. Uses, p. 348, says it never ought to have been sanctioned at all. In Thacher v. Omans (decided in 1792), reported in 3 Pick. 521, on page 528, the court refer to the censures of Blackstone and Lord Mansfield, and express strong doubts as to the propriety of admitting it in this country; and Mr. Greenleaf says it may well be doubted whether the rule has been adopted in this country. Note to Greenl. Cruise, tit. 12, c. 1, § 4. With such a weight of authority against it, if the effect of the rule would be to defeat such conveyances as we are now considering, we think we might be warranted in rejecting it altogether. But such is not its effect. When a freehold is conveyed, to commence at a future day, till such future day arrives the use results to the grantor, and then passes to the grantee; and the uses are not limited one upon the other, but one after the other; and, in this way, a fee simple may be carved into an indefinite number of less estates. "So long as a regular order is laid down, in which the possession of the lands may devolve, it matters not now many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus, a grant may be made at once to fifty different people, separately, for their lives." Williams, Real Prop. 189, 190. "Shifting or substituted uses do not fall within this technical rule of law, for they are merely alternate uses." 4 Kent, Comm. 301.

The statement that a freehold to commence in futuro cannot be conveyed by a deed of bargain and sale, which seems first to have been made in Pray v. Pierce, as before stated, has been several times repeated in Massachusetts (Welsh v. Foster, 12 Mass. 93; Parker v. Nichols, 7 Pick. 115; Gale v. Coburn, 18 Pick. 397; Brewer v. Hardy, 22 Pick. 376), and once at least in this state (Marden v. Chase, 32 Me. 329); but the only case we have found in which an attempt has been made to give a reason for the supposed rule is that of Welsh v. Foster; and a careful examination has satisfied us that the argument in that case is unsound, and not supported by any adjudged case that has the weight of authority. It is admitted in all these cases that if it can be shown that the parties to such deeds are near relatives, effect may be given to them as covenants to stand seized, made, not as they purport to be, for a pecuniary consideration, but in consideration of love and affec-

tion. And there is no doubt that if two deeds should be executed instead of one; that is, if the grantor should first convey the whole estate, and then take back a life lease, the transaction would be held legal. The doctrine, therefore, that a freehold to commence in futuro cannot be conveyed by a deed of bargain and sale, amounts to no more than this: that if the owner of a fee simple estate proposes to reserve to himself a life estate, and to sell the residue, if he deals with a relative, such an arrangement can be carried into effect by making one deed; but if he deals with a stranger it will be necessary to make two. It is certainly very strange that a doctrine so technical, so easily evaded, and so utterly destitute of merit, should have gained the currency it has.

We entertain no doubt that, by deeds of bargain and sale, deriving their validity from the statute of uses, freeholds may be conveyed to commence in futuro. It will be seen that the law is so held in England, and by an overwhelming weight of authority in this country. In fact that such was the law seems never to have been doubted except in Massachusetts and this state; and we think the error originated in the unauthorized remark found in Pray v. Pierce, and has been repeated from time to time without receiving that consideration which its importance demanded.

We also are of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of uses. In Thacher v. Omans, 3 Pick., on page 525, Chief Justice Dana, speaking of our statute of conveyances, first enacted in 1697, re-enacted in the Revised Laws of 1784, incorporated into the statutes of this state in 1821, and still in force, says: "This statute was evidently made to introduce a new mode of creating or transferring freehold estates in corporeal hereditaments, namely, by deed, signed, sealed, acknowledged, and recorded, as the statute mentions; it does not prescribe any particular kind of deeds or conveyances, but is general, and extends to all kinds of conveyances." On page 532 he further says: "It seems evident to me that a deed executed, acknowledged and recorded as our statute requires, cannot be considered as a bargain and sale, because the legal estate is thereby passed without the operation of the statute of uses, in as ample a manner as by a feoffment at common law, accompanied with the ancient ceremony of livery of seizin." Such also were the opinions of Chancellor Kent and Professor Greenleaf. 4 Kent, Comm. 461; Greenl. Cruise, tit. 12, c. 1, § 4, note, tit. 32, c. 4, § 1, note. Mr. Greenleaf in the note first cited, says that in most of the states, (including Maine,) "deeds of conveyance derive their effect, nor from the statute of uses, but from their own statutes of conveyances; operating nearly like a feoffment, with livery of seizin, to convey the land, and not merely to raise a use to be afterwards executed by the statute of uses." Mr. Oliver, in his work on Conveyancing (Ed. 1853, p. 281), speaking of our common warranty deed, says: "This deed derives its operation from statute, and has therefore some properties peculiar to itself. * * * The transfer is not affected by the execution of a use, as in a bargain and sale, but the land itself is conveyed, as in a feoffment, except that livery of seizin is dispensed with, upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it." We think these views are sound; and if any of the technical rules which have grown up under the statute of uses stood in the way of giving effect to deeds executed in accordance with the provisions of our statute, simply because they purport to convey freeholds to commence at a future day, we think effect might be given to them independently of the statute of uses. But, in our judgment, no such rules do stand in the way of giving effect to such deeds. They may be upheld either as bargains and sales under the statute of uses, or as conveyances deriving their validity from our own statutes.

Having come to the conclusion that the demandant is entitled to recover upon another ground, it was not absolutely necessary to consider the validity of the deed from Mrs. Brown to Oliver S. Nay, which purports to convey a freehold to commence in futuro. But, as the question involved is an important one, and was ably argued by the counsel in the case; and, as the court has already decided one case within the past year (Hunter v. Hunter, in the county of Sagadahoc), in accordance with the views here expressed, but without any written opinion; and as several other suits, involving the same question, are still pending before the court, we deemed it best to make known our decision of the question, and to state our reasons for the decision, in connection with this case. Judgment for demandant.

APPLETON, C. J., and CUTTING, DAVIS, and BARROWS, JJ., concur.

BROWN v. PHILLIPS et al.

(18 Atl. 249, 16 R. I. 612.)

Supreme Court of Rhode Island. Aug. 17, 1889.

Bill in equity to reform a deed. On demurrer to bill.

Charles F. Baldwin, for complainant. *Stephen A. Cooke, Jr.*, and *George J. West*, for respondents.

STINESS, J. John Kelton devised his estate to his wife, Sally Kelton, for life, with power to sell so much and such part of the same, from time to time, as she might think necessary for her comfortable support. After his death Sally Kelton made a deed of the estate to Herbert B. Wood, in trust, that he should manage the same, and from the income or proceeds of sale thereof pay the cost and expenses of her care and support; no other reference than by this provision being made to the power under which she might sell. In Phillips v. Wood, 16 R. I. 274, 15 Atl. Rep. 88, this court held that the power was personal, and not assignable; that she only had authority to sell what was necessary for her comfortable support, and that she could not transfer the estate, with that discretionary power, to another. Consequently the trustee took only what the grantor had the right to convey, outside of the power, which was her life-estate. Wood then held the legal title to her life-estate, and she had the equitable, beneficial interest therein. After this decision, Mrs. Kelton made another deed to Wood of all her right, title, and interest in and to the estate of her husband; no reference whatever being made to her power to sell under the will, for her support. In Phillips v. Brown, 16 R. I. 279, 15 Atl. Rep. 90, this court held that this second deed, in the absence of any reference to the power and of anything to show an intention to act under it, operated only to convey the interest she then had in the estate, which was her equitable estate for life. Mrs. Kelton died in August, 1887. The complainant, to whom Wood conveyed a part of the estate, now seeks to have the second deed of Mrs. Kelton to Wood reformed, upon the ground that Mrs. Kelton intended by that deed to convey the estate in execution of the power, and that by mistake the deed was so drawn that it failed to express her true intent. The defendant Phillips, residuary legatee under the will of John Kelton, demurs to the bill. The question, then, is whether the case stated entitles the complainant to relief. It may well be questioned whether, if the deed should be reformed so as to express an intention to convey the property under the power, it would show a compliance with the power. The bill does not set forth a sale of the property to provide for Mrs. Kelton's support, but a simple conveyance "for one dollar and other good and valuable consideration." We may assume that the "other consideration" included an agreement on the part of Wood to provide for Mrs. Kelton's support. But if so, turning over property on such an agreement is a very different thing from selling so much thereof as may be necessary for her support. However, as this point has not been taken, nor argued, we pass it by and consider the case as presented.

It is well settled, as the complainant claims, that a court of equity will aid the defective execution of a power; but, as stated in the leading case of Tollet v. Tollet, 2 P. Wms. 489, 1 White & T. Lead. Cas. *227, *228, there is a difference between a non-execution and a defective execution of a power. The "court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of a party whether to execute or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself." In order to sustain the execution of a power the instrument must, at least, show an intention or attempt to execute it. This may appear when the instrument would otherwise be inoperative, or when the reference to the subject of the power is such as to manifest the intention; but the non-execution of a power cannot be aided by proof of an intention to execute. Wilkinson v. Getty, 13 Iowa, 157; Garth v. Townsend, L. R. 7 Eq. 220; Foos v. Scarf, 55 Md. 301; Mitchell v. Denson, 29 Ala. 327. Mrs. Kelton's deed makes no reference to the power, nor to the subject of the power, by description of the estate which she could sell under it, as distinct from her life-estate. Nor was the deed inoperative without the aid of the power. Nothing appears in it to show an intent to convey anything beyond her own interest. It is like the will in Andrews v. Emmot, 2 Brown, Ch. 297, which Lord ALVANLEY, in Hales v. Margerum, 3 Ves. 299, 301, called a leading case upon this point. There, after saying the power need not be recited in express terms, but that the intent must appear by some kind of reference to the power, the court added: "But the testator has not described anything; all his expressions will refer to his own property." The recent case of Patterson v. Wilson, 64 Md. 193, 1 Atl. Rep. 68, gives a careful review of this subject. It was held, as the will in question contained no reference to the power nor to the subject on which the power was to operate, and as it was not denied that the testator had other property, her will would be operative without the aid of the power, and could not be regarded as an execution of the power. See, also, Bingham's Appeal, 64 Pa. St. 345; Lippincott v. Stokes, 6 N. J. Eq. 122. Our conclusion is that, as Mrs. Kelton did not expressly undertake to act under the power, nor manifest an intention or attempt so to do, but made a deed which, by its terms, was operative only upon her own interest in the property, the bill presents a case of non-execution simply, which the court cannot aid. The demurrer to the bill must be sustained.

THORNBURG et al. v. WIGGINS et ux.

(34 N. E. 999, 135 Ind. 178.)

Supreme Court of Indiana. Oct. 19, 1893.

Appeal from circuit court, Randolph county; Leander Monks, Judge.

Action by Daniel S. Wiggins and wife against William H. Thornburg and others to enjoin a sale under execution. Demurrers to the complaint were overruled, and defendants appeal. Reversed.

Thompson, Marsh & Thompson, for appellants. Watson & Watson and J. L. Engle, for appellees.

DAILEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate, therein described, containing 80 acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate, which they took and accepted, ever since have held, and now hold by entireties, and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of $403.70 and costs against one John T. Burroughs and the appellee Daniel S. Wiggins as partners doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment, and placed in the hands of the appellant Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof taken as the property of said appellee Daniel S Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded, by the direction of said Howard and Gaston, to advertise said real estate for sale under said execution and levy to make said debt, and did on the 8th day of June advertise the same for sale on the 3d day of July, 1886, and will on said day sell the same unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellees' title, etc. The second paragraph is the same as the first in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties. The granting clause of the deed is as follows: "This indenture witnesseth that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph county, in the state of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc. Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers. Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution.

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent, in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, or years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise except by the instrument providing for such tenancy. Griffin v. Lynch, 16 Ind. 398. 9 Am. & Eng. Enc. Law, 850, says: "Husband and wife are, at common law, one person, so that when realty vests in them both equally, * * * they take as one person; they take but one estate, as a corporation would take. In the case of realty, they are seised, not per my et per tout, as joint tenants are, but simply per tout; both are seised of the whole, and, each being seised of the entirety, they are called 'tenants by the entirety,' and the estate is an estate by entireties. * * * Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole; the estate is inseverable, cannot be partitioned; neither husband nor wife can alone affect the inheritance; the survivor takes the whole." This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called 'estates by entirety.'" As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. Arnold v. Arnold, 30 Ind. 305; Davis v. Clark, 26 Ind. 424. Strictly speaking, estates by entireties are not joint tenancies (Chandler v. Cheney, 37 Ind. 391; Hulett v. Inlow, 57 Ind. 412), the husband and wife being seised, not of moieties, but both seised of the entirety per tout, and not per my (Jones v. Chandler, 40 Ind. 589; Davis v. Clark, supra; Arnold v.

Arnold, supra). It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such, or their marital relation referred to. Morrison v. Seybold, 92 Ind. 302; Hadlock v. Gray, 104 Ind. 596, 4 N. E. 167; Dodge v. Kinzy, 101 Ind. 102; Hulett v. Inlow, 57 Ind. 414; Chandler v. Cheney, 37 Ind. 395. But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance which clearly indicate the creation of a different estate. Hadlock v. Gray, supra; Edwards v. Beall, 75 Ind. 401. Having its origin in the fiction of common-law unity of husband and wife, the courts of some states have held that married women's acts extending their rights destroyed estates by entirety, but this court holds otherwise (Carver v. Smith, 90 Ind. 226); and the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate. Jones v. Chandler, supra; Morrison v. Seybold, supra. There can be no partition. Chandler v. Cheney, 37 Ind. 391. A mortgage executed by the husband alone is void (Jones v. Chandler, 40 Ind. 391), and the same is true of a mortgage executed by both to secure a debt of the husband (Dodge v Kinzy, 101 Ind. 105); and the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it (State v. Kennett, 114 Ind. 160, 16 N. E. 173). A judgment against one of them is no lien upon it. Ditching Co. v. Beck, 99 Ind. 250; McConnell v. Martin, 52 Ind. 434; Orthwein v. Thomas (Ill. Sup.) 13 N. E. 564. Upon the death of one, the survivor takes the whole in fee. Arnold v. Arnold, supra. The deceased leaves no estate to pay debts (Simpson v. Pearson, 31 Ind. 1); and during their joint lives there can be no sale of any part on execution against either (Carver v. Smith, supra; Dodge v. Kinzy, 101 Ind. 105; Hulett v. Inlow, 57 Ind. 412; Chandler v. Cheney, supra; Davis v. Clark, supra; McConnell v. Martin, supra; Cox's Adm'r v. Wood, 20 Ind. 54). The statutes extending the rights of married women have no effect whatever upon estates by entirety. Carver v. Smith, 90 Ind. 223. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. Enyeart v. Kepler, 118 Ind. 34, 20 N. E. 539. The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property with us for 86 years. Section 2922, Rev. St. 1881, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy." Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife. Under a statute of the state of Michigan, similar in all its essential qualities to our own, the court held that, "where lands are conveyed in fee to husband and wife, they do not take as tenants in common" (Fisher v. Provin, 25 Mich. 347), they take by entireties. Whatever would defeat the title of one, would defeat the title of the other. Manwaring v. Powell, 40 Mich. 371. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest; neither can be said to own an undivided half. Insurance Co. v. Resh, Id. 241; Allen v. Allen, 47 Mich. 74, 10 N. W. 113.

While the rule of entireties was predicated upon a fiction, the legislative intent in this state has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. Carver v. Smith, 90 Ind. 227. "Where a rule of property has existed for seventy years, and is sustained by a strong and uniform line of decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule is founded. Such a rule of property will be overruled only for the most cogent reasons, and upon the strongest convictions of its incorrectness. * * * It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the power of the wife, which existed already under the Acts of 1852 and the years following. * * * It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife they should hold by entireties, and not as joint tenants or tenants in common." Carver v. Smith, supra. In Chandler v. Cheney, 37 Ind., on page 396, the court says: "It was a well-settled rule at common law that the same form of words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted." The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint ten-

ants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Prest. Est. 132; 3 Bl. Comm., Sharswood's note; 4 Kent, Comm., side page 363; 1 Bish. Mar. Wom. § 616 et seq.; Freem. Coten. § 72; Fladung v. Rose, 58 Md. 13–24. "And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stew. Husb. & Wife, §§ 307–310; Tied. Real. Prop. § 244. "And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc. (Hoffman v. Stigers, 28 Iowa, 310; Brown v. Brown, 133 Ind. 476, 32 N. E. 1128), "so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture" (McDermott v. French, 15 N. J. Eq. 80). In Hadlock v. Gray, 104 Ind. 599, 4 N. E. 167, a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court say: "The language employed in the deed plainly declares that Isaac Cannon and Mary Cannon are not to take as tenants by entirety. The result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. * * * The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife." The court further say: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. * * * But, while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear upon principle that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife." The court then adopts the language of Washburn (1 Washb. Real Prop. 674) and Tiedeman, supra. In Edwards v. Beall, supra, the court hold that when lands are granted husband and wife as tenants in common they will hold by moieties, as other distinct and individual persons would do. If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants, because by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties; joint tenancy would be superseded or put in abeyance by the estate created by law, —tenancy by entirety. The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy." These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold, not by entireties, but in joint tenancy. A joint tenant's interest in property is subject to execution. Freem. Ex'ns, 125. Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.

DYER v. CLARK et al.

(5 Metc. 562.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March Term, 1843.

Mr. Pope, for plaintiff. G. T. Curtis, for defendants.

SHAW, C. J. This is a suit in equity by the surviving partner of the firm of Burleigh & Dyer, established by articles of copartnership, under seal, for the purpose of carrying on the business of distillers. The principal question is one which has arisen in several other cases, and is this; whether real estate, purchased by copartners, from partnership funds, to be held, used and occupied for partnership purposes, is to be deemed in all respects real estate, in this commonwealth, to vest in the partners severally as tenants in common, so that on the decease of either, his share will descend to his heirs, be chargeable with his wife's dower, and in all respects held and treated as real estate, held by the deceased partner as a tenant in common; or, whether it shall be regarded as quasi personal property, so as to be held and appropriated as personal property, first to the liquidation and discharge of the partnership debts, and to the adjustment of the partnership account, and payment of the amount due, if any, to the surviving partner, before it shall go to the widow and heirs of the deceased partner. This is a new question here, and comes now to be decided, for the first time.

There are some principles, bearing upon the result, which seem to be well settled, and may tend to establish the grounds of equity and law, upon which the decision must be made. It is considered as established law, that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of partnership property for a partnership debt, though subsequent in time, will take precedence of a prior attachment of the same property for the debt of one of the partners. It is also considered, that however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners. 1 Ves. Sr. 242.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and therefore much time may elapse, before the affairs can be wound up, the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the fund.

When, therefore, one of the partners dies, which is de facto a dissolution of the partnership, it seems to be the dictate of natural equity, that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased, and standing on his rights, should take exactly the same measure of justice, as such partner himself would have taken, had the partnership been dissolved in his life-time; and such interest would be the net balance of the account, as above stated.

Such indeed is the result of the application of the well known rules of law, when the partnership stock and property consist of personal estate only. And as partnerships were formed mainly for the promotion of mercantile transactions, the stock commonly consisted of cash, merchandize, securities, and other personal property; and therefore the rules of law, governing that relation, would naturally be framed with more especial reference to that species of property. It is therefore held, that on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy, as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money, and the debts are paid; though, for the purpose of encouraging trade, it is held that the harsh doctrine of the jus accrescendi, which is an incident of joint tenancy, at the common law, as well in real as in personal estate, shall not apply to such partnership property; but, on the contrary, when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds.

Then the question is, whether there is any thing so peculiar in the nature and characteristics of real estate, as to prevent these broad principles of equity from applying to it. So long as real estate is governed by the strict rules of the common law, there would be, certainly, great difficulty in shaping the tenure of the legal estate in such form as to accomplish these objects. Should the partners take their conveyance in such mode as to create a joint tenancy, as they still may, though contrary to the policy of our law, still it would not accomplish the purposes of the parties; first, because either joint tenant might, at his option, break the joint tenancy and defeat the right of survivorship, by an alienation of his estate, or (what would be still more objectionable) the right of survivorship at the common law would give the whole estate to the survivor, without

liability to account, and thus wholly defeat the claims of the separate creditors, and of the widow and heirs of the deceased partner.

But we are of opinion, that the object may be accomplished in equity, so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purposes of the partnership; and since this court has been fully empowered to take cognizance of all implied as well as express trusts, and carry them into effect, there is no difficulty, but on the contrary great fitness, in adopting the rules of equity on the subject, which have been adopted for the like purpose, in England and in some of our sister states. And it appears to us, that considering the nature of a partnership, and the mutual confidence in each other, which that relation implies, it is not putting a forced construction upon their act and intent, to hold that when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of the common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate, until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration, that the partners may have contributed to the capital stock in unequal proportions, or indeed that one may have advanced the whole. Take the case of a capitalist, who is willing to put in money, but wishes to take no active concern in the conduct of business, and a man who has skill, capacity, integrity and industry to make him a most useful active partner, but without property, and they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock, and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm, as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest, indirectly, in the same appropriation; not because they have any lien, legal or equitable (2 Story, Eq. § 1253), upon the property itself; but on the equitable principle, which determines that the real estate, so held, shall be deemed to constitute part of the fund from which their debts are to be paid, before it can be legally or honestly diverted to the private use of the partners. Suppose this trust is not implied, what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthy partner were to die: The legal estate descends to his heirs, clothed with no trust in favor of the surviving partner: The latter, without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion, and perhaps a large portion, of the fund bound for its payment, is withdrawn. Or suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and subject to this, all those will take, who are entitled to the property; namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner.

It may happen that real estate may be so purchased by partners, and out of partnership funds, in such manner as to preclude such implied trust, and indicate that the parties intended to purchase property to be held by them separately for their separate use; as where there is such an express agreement at the time of the purchase, or a provision in the articles of copartnership, or where the price of such purchase should be charged to the partners respectively, in their several accounts with the firm. This would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust. If, in the conveyance, the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one; because those words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them. But, as we have already seen, such legal estate is not at all incompatible with an implied trust for the partnership.

The result of this part of the case seems to us to be this; that when, by the agreement and understanding of partners, their capital stock and partnership fund consist, in whole or in part, of real estate—inasmuch as it is a well known rule governing the relation of partnership, that neither partner can have an ultimate and beneficial interest in the capital until the

debts are paid and the account settled; that both rely upon such rule and tacitly claim the benefit of it, and expect to be bound by it; the same rule shall extend to real estate. The same mutual confidence, which governs the relation in other respects, extends to this; and, therefore, when real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them and their respective heirs, clothed with a trust for the partners, in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. It follows, as a necessary consequence, that such partnership real estate cannot be conveyed away and alienated by one of the partners alone, without a breach of such trust; and that such a conveyance would not be valid against the other partner, unless made to one who had no notice, actual or constructive, of the trust. But, if a person knows that a particular real estate is the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.

But we think the same conclusion is well supported by authorities, although there has been some diversity of opinion amongst the earlier cases.

The adjudged cases were so fully examined by the counsel in their arguments, that it is unnecessary to state them in detail. The principles, which have already been suggested as the grounds on which we decide the present case, were applied in Phillips v. Phillips, 1 Mylne & K. 649; Broom v. Broom, 3 Mylne & K. 443; Sigourney v. Munn, 7 Conn. 11; Hoxie v. Carr, 1 Sumn. 173, Fed. Cas. No. 6,802. In these cases, all the previous decisions on the subject were carefully considered. See, also, 3 Kent, Comm. (4th Ed.) 36-39; 1 Story, Eq. §§ 674, 675; 2 Story, Eq. § 1207; Colly. Partn. 76; Cary, Partn. 27, 28; Houghton v. Houghton, 11 Sim. 491.

It has been supposed that the case of Goodwin v. Richardson, 11 Mass. 469, stands opposed to the decision now made. I do not think it does. That case was decided in 1814, before equity powers existed in this commonwealth, on the general subject of trusts. It was in terms a question as to the vesting of the real estate; and the court were bound to decide the case for the defendant, if they found, upon the facts, that the estate in question had vested in the partners, on foreclosure, as tenants in common. Had they decided the other way, they must have decided that partners, taking real estate in satisfaction of a partnership debt, by foreclosing a mortgage, would hold the estate as joint tenants, with right of survivorship at law, without liability to account—a principle directly opposed to the Statutes of 1785, chapter 62, respecting joint tenancy; because in that case and at that time the real estate must descend and vest according to the rules of law, and there was no court of equity competent to require the surviving partner to account with the representatives of the deceased party.

In that case, as it happened, both the separate estate and the partnership estate were insolvent, and therefore good justice would have been done, in deciding that the plaintiff should recover for the benefit of the partnership creditors. But the court were deciding upon a rule of law, which must apply to all cases, and they could not have decided that for the plaintiff without holding that all such estate, held by partners, should be deemed joint estate, with a right of survivorship at law, and without liability to account; a rule opposed to the plainest principles of equity, and to the spirit, if not to the letter, of the statute respecting joint tenancy. The court were dealing solely with a question of law, in determining a legal estate, and intimate that a court of equity might make joint real estate applicable, as personal, to the payment of partnership debts. We consider, therefore, that that decision is not opposed to the decision, upon equitable principles, to which we now propose to come.

On the facts of the present case, we are of opinion that the real estate in question was a part of the capital stock purchased out of the partnership funds, for the partnership use, and for the account of the firm. The partners entered into articles, as distillers. The business required a large building and fixtures, which they purchased and paid for in part out of the joint funds, and gave notes in the partnership name for the remainder of the price, and the estate was regarded by them as partnership effects. The repairs and improvements were also charged to joint account. These are all decisive indications of joint property.

The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant, Clark, as administrator of Burleigh, the deceased partner, has sold an undivided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower, for a nominal sum. But we cannot perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not entitled to dower. For all beyond that, she will be entitled, because he held it as legal estate, unless she is barred by her release; of which we give no opinion.

The plaintiff is entitled to a decree charging the amount of rents and profits in his hands, and so much of the proceeds of the sale made by the administrator, as will be sufficient to discharge the balance of the partnership account; and the rest of the proceeds will remain in the hands of Clark, the administrator of Burleigh, to be distributed according to law.

POST v. PEARSALL.[1]

(22 Wend. 425.)

Court of Errors of New York. Dec., 1839.

S. A. Foot, for plaintiff in error. H. P. Edwards and G. Wood, for defendant in error.

WALWORTH, Ch. Nearly the whole law on the subject of customary rights, easements, and public highways, and places in the nature of highways or public walks for health or recreation, and also of dedications for charitable or pious purposes, and the various decisions on these subjects, both in this country and in England, are collected in the very learned and elaborate opinion of Mr. Justice Cowen, who gave the reasons for the decision of the supreme court in this case, and in the case of Pearsall v. Hewlett, 20 Wend. 111, which is also before us for decision at this time. Little, therefore, remains for me but to apply the legal principles thus collected, to the facts of the case under consideration.

The plaintiff in error claims a prescriptive right for all the inhabitants of the state, or the public at large, to enter the locus in quo, which is unquestionably the soil and freehold of Pearsall, and to use it as a landing place to deposit manure brought thither by water, and to load and unload manure and other materials thereon. If this was claimed as a customary right in behalf of the inhabitants of a town, hamlet or other local district, it might be necessary to decide whether a right to deposit manure and other materials upon the land of another, and let them remain there until the depositor could make sale thereof, or until it suited his convenience to remove them, was such an easement as could be prescribed for as a customary right, without reference to any dominant tenement; or whether it was a profit a prendre, or such an interest in the soil and freehold of another as could only be prescribed for in a que estate. In the great contest between the ball players and the rabbits relative to the right of deposit and the privilege of scratching within the golfing links of St. Andrews, which case was twice before the house of lords in England, the late Lord Chancellor Eldon, although he amused their lordships at the expense of the Scottish judges, the magistrates of St. Andrews, the officers and students of the college, and of the golfing society, and was a little smutty withal, had in that case a strong impression upon his mind that a customary servitude or easement could not be supported, which would deprive the owner of the servient tenement of the whole beneficial use of his property. See Dempster v. Cleghorn, 2 Dow, 40. I presume that strong impression was founded upon the established principle of the common law, that a custom to be good, must be reasonable; and I doubt whether any member of this court would consider a custom reasonable which should allow the community at large to deposit manure, without restriction as to kind or quantity, upon his premises, within a few rods of his mansion; and to suffer it to remain there until it suited the convenience of the depositors to remove it; especially if it should be bone manure, a commodity with which it seems the farmers in the neighborhood of the locus in quo have recently found it profitable to enrich their farms. Indeed, in its legal effect upon the rights of the owner of the soil, it is very difficult to distinguish the occupancy claimed in this case from the temporary occupancy by fishing huts, which was claimed in Cortelyou v. Van Brundt, 2 Johns. 357. But as the law is well settled that a customary accommodation in the lands of another, to be good, must be confined to the inhabitants of a local district, and cannot extend to the whole community or people of the state, the right claimed by Post, the plaintiff in error, cannot be sustained as a customary right or easement consistently with the rules of law.

Nor can it be sustained as an ordinary easement, founded upon a presumed grant from the owner of the premises in which the right or easement is claimed. Such easements are either personal and confined to an individual for life merely, or are claimed in reference to an estate or interest of the claimant in other lands as the dominant tenant; for a profit a prendre in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land itself. The three personal servitudes of the Roman law, use, usufruct and habitation, and which are still retained in the laws of France and of Spain and of Holland were not, strictly speaking, servitudes, but limited estates in the land; and they are now separately provided for as such by the Napoleon Code: one article of which expressly declares that servitudes cannot be personal, and that they can only exist when imposed upon an estate and for the benefit of an estate. Article 686.

Neither can the right claimed in this case be sustained upon the principles upon which the dedication of highways and streets for the passage of carriages and other conveyances, and of public squares in cities and villages as promenades for the health and exercise of the inhabitants, have been declared and adjudged to be public rights. Public places of this description, as well as public highways, were well known even in the days of Justinian, and were protected by the same pretorian interdict from all obstructions which could interfere with the free passage of the people, without the consent of the public authorities. Poth. Pand. de Just. lib. 43, tit. 8, art. 1. They were equally well known in the ancient law of France, and embraced the public squares or promenades, where the whole community had a right to go; and the places where the public fairs were held. 14 Guizot, Repert. art. "Public." Although at the time of the publication of the laws of William the Conqueror there were but four great roads

[1] Concurring opinions of Senators Edwards, Livingston, and Verplanck, and dissenting opinion of Senator Furman, omitted.

in England called the king's highways, yet no one can doubt that there were, even at that time, innumerable thoroughfares, and many squares and open spaces, which had been dedicated to the use of the people at large, for passages and promenades; and the number since that time has probably increased an hundred fold. The law of dedication, therefore, which was applicable to thoroughfares, was properly applicable to market places and promenades, although they were not highways in the ordinary sense of the term. But a public place for landing and depositing manure must, from its very nature, be confined to a very few individuals; and would generally be permitted as a mere neighborhood accommodation, while the owner of the land on which it was deposited had no immediate use of the premises himself. The only right, therefore, which would be likely to be acquired by long user would be a right of easement or accommodation in favor of the owners of the farms, for the use of which the manure had from time to time been brought; so as to authorize their successors in such ownership to prescribe in a que estate. I think, therefore, it would be most unreasonable to apply the principles of dedication to such a case. A dedication for pious or charitable purposes does not vest a legal right but merely creates a pious or charitable trust, which under our statute relative to religious corporations is turned into a legal estate. Dutch Church v. Mott, 7 Paige, 77; Curd v. Wallace, 7 Dana, 192. Such a dedication, therefore, has no applicability to the case under consideration.

The rights to public watering places on Long Island can be sustained either as customary rights, or as easements appurtenant to the estates which have been supplied with water therefrom, for a sufficient time to raise the legal presumption of a grant. The right to take water from the pond of another is a mere easement, and not a profit a prendre. Manning v. Wasdale, 2 Harr. & W. 431.

I think the judgment of the court below in this case was not erroneous, and that it ought to be affirmed.

* * * * * * *

BOWEN et al. v. CONNER.

(6 Cush. 132.)

Supreme Judicial Court of Massachusetts. Worcester. Oct. Term, 1850.

B. F. Thomas, for plaintiffs. P. C. Bacon and H. D. Stone, for defendant.

SHAW, C. J. This is an action on the case for a nuisance occasioned by the obstruction of a private way, specially described as appurtenant to the land of the plaintiffs.

The question, and the only question argued, does not appear to be the question submitted to the court. The question reserved on the agreed statement of facts is, whether the building described, standing within the limits of the way claimed, was an obstruction. The only question argued was, whether by force and effect of the deeds referred to, and the rules of law applicable to them, the plaintiffs had the right of way which they claim.

The facts are, that the plaintiffs and the defendant were tenants in common of a small parcel of land in Worcester, bounding on one side, on a public highway called Pine Meadow street, about 100 or 130 feet, and extending back 300 or 400 feet, the plaintiffs owning one moiety and the defendant the other. On the 9th of March, 1849, they made partition by deed. The parties did not join in one deed, but each made a deed to the other. These deeds, bearing the same dates, each reciting that the estate released is part of an estate then held by the parties in common, and each reciting the simultaneous conveyance of the other as a consideration, are to be taken as parts of one and the same transaction, and considered together for the purposes of construction. The plaintiffs took the rear part of the lot as their property, to hold in severalty, and the defendant the front part, probably allowing a larger quantity to the rear lot, as a balance to the greater value, by the superficial foot, of the front lot. In the deed of Bowen and Tower to Conner of the front lot, after the recital and granting part of the deed, is the following clause: "Reserving forever a right of way over a street, which said Conner (the grantee) is to make from the north-west corner of said granted lot to said Pine Meadow road; said street to be thirty feet wide, adjoining the west line of said granted lot." The question is, whether this secured to the plaintiffs a right of way. As to the nature of that right, if one was well created, considering the circumstances, and construing the deeds together, we think it was a right secured to the plaintiffs and their assigns, as owners of the rear lot, and therefore was a right of way annexed to the estate before owned in common, but then set off in severalty to the plaintiffs.

It is found in the statement of facts, that the rear land was intended to be used for house-lots; but as that fact is not mentioned in either of the deeds, and remained only in intention, we have placed no stress upon it. There is another consideration, however, of some importance; in referring to the plan, which is made a part of the case, we suppose that the entire land divided was surrounded by land owned by other private proprietors, and that there was no access to any highway from the original lot, but upon the Pine Meadow road; if such be the case, it would seem that by established principles, the grantees of the interior lot would have had a way of necessity over the front lot, if there had been no specific reservation. This strengthens the conclusion, that it was the intention of both parties, that such a way should be established.

It was argued, that according to the English authorities, an easement, as a way, could not be created by a mere reservation. We have not thought it necessary to review the English authorities minutely on this subject; we know there is much nicety in the technical distinction between an exception and a reservation. Many of the cases in England have arisen upon the execution of powers of leasing, with certain precise reservations enumerated; and the question is, whether the lease made is within the power, which in all such cases is to be construed strictly. In our own conveyancing, this distinction is not so precisely observed, but a clause of reservation is construed to be an exception, if that will best effect the intent of the parties. And so in the English cases, the term reservation is often construed to be a good exception. But the distinction between an exception and a reservation is often very uncertain. Co. Litt. 47a; Shep. Touch. 80; 4 Cruise, Dig. (Greenl. Ed.) 271, note 2; Thompson v. Gregory, 4 Johns. 81. But in a case like this, the right being established by a formal act, to which all the parties interested were parties and assenting, we consider it immaterial, whether the easement for the way intended to be established is technically considered as founded on an exception, a reservation, or an implied grant.

It seems by the authorities, that, had there been no express reservation in the present case, by necessary implication, the plaintiffs would have had a way as of necessity. But this, by the better authorities, is regarded as a way created by tacit reservation, or exception. Pomfret v. Ricroft, 1 Wms. Saund. 321, note 6; Clark v. Cogge, Cro. Jac. 170; Howton v. Frearson, 8 Term R. 50; Bull. N. P. 74; 3 Kent, Comm. (4th Ed.) 424; 4 Kent, Comm. (4th Ed.) 468; 2 Cruise, Dig. (Greenl. Ed.) 28, 29; Holmes v. Goring, 2 Bing. 76. If a way would be established for the grantor, under such circumstances, on the ground, that the law will presume that the grantor intended to reserve or retain to himself a right of way over the land granted, for the use of the estate retained, a fortiori shall the grantor be entitled to that right, when the intent is expressed by the grantor, and the grantee by accepting the deed with such a clause inserted assents to it.

Even if these two deeds were not be construed together, as an indenture, there is abundant authority to show, that the grantee, by his acceptance of a deed-poll, becomes bound by all the restrictions, limitations, reservations, and

exceptions contained in it. Newell v. Hill, 2 Metc. (Mass.) 180.

Upon principle, it appears to us, that this right, plainly intended by both parties to be secured to the plaintiffs, can legally be secured in the manner adopted in this deed, treating the right reserved as an exception. And according to a well known rule of law, extensively applicable to conveyancing, if a deed cannot operate in one legal mode, to effect the intention of the parties, it shall operate in another to accomplish that purpose, if it can be done without violating any principle of law.

Prior to these deeds, the plaintiffs, as tenants in common, had a right to pass over every part of this land at their pleasure. And each tenant in common had this entire right, although he had not the entire fee. When, therefore, the grantors conveyed the front lot, they restricted themselves from any further right to pass over the whole and every part, and limited themselves to the strip thirty feet wide, specially described. This was a part of the right previously enjoyed, and this they excepted out of the grant. Had it been reserved by implication, as a way of necessity which would have been general and undefined, it would have been competent for the parties, by a deed like the present, to limit and define the right to the specific thirty feet, and such an agreement would be binding.

But were the case less clear upon principle, and upon the authorities, the court are of opinion, that the law is settled in Massachusetts, by a series of decisions, that a right of way may be as well created by a reservation or exception, in the deed of the grantor, reserving or retaining to himself and his heirs a right of way, either in gross, or as annexed to lands owned by him, so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way, either in gross or as appurtenant to other estate of the grantee.

The rule has been rather assumed and taken for granted, than discussed and formally decided; but it has been judicially stated, adopted, and acted upon as settled law, in repeated instances, of which it will be necessary to cite a few only. White v. Crawford, 10 Mass. 183; Atkins v. Bordman, 20 Pick. 291; Atkins v. Bordman, 2 Metc. (Mass.) 457; Newell v. Hill, Id. 180; Mendell v. Delano, 7 Metc. (Mass.) 176. The last case was stronger than the present; a right of way was reserved in a deed-poll, made by a tenant in common, charging the estate conveyed with a servitude, being a right of way, in favor of his separate contiguous estate; and it was held to be an easement annexed to the latter, and binding upon parties and privies claiming under the deed by which the right of way was reserved.

The court are, therefore, of opinion, that the plaintiffs had the right of way alleged to be disturbed by the defendant; and on the facts agreed, judgment must be entered for the plaintiffs, for the amount of damages agreed upon.

THURSTON v. HANCOCK et al.

(12 Mass. 220.)

Supreme Judicial Court of Massachusetts. Suffolk. · March Term, 1815.

Otis & Prescott, for plaintiff. The Solicitor General, and Mr. Aylwin, for defendants.

PARKER, C. J. The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss; but after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In 1804 he erected a brick dwelling-house and out-houses on this lot, and laid his foundation, on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and, in the same year, commenced levelling the hill, by digging and carrying away the gravel; they not actually digging up to the line of division between them and the plaintiff; but keeping five or six feet therefrom. Nevertheless, by reason of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house, as to make it prudent and necessary, in the opinion of skillful persons, for the safety of the lives of himself and his family, to remove from the house; and, in order to save the materials, to take down the house, and to rebuild it on on a safer foundation. The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages, in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question; as the fee was in the town without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it.

The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property or impair any actual existing rights of another. "Sic utere tuo ut alienum non lædas." Thus, no man, having land adjoining his neighbour's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbour's house, or expose it to injury from the weather or to unwholesome smells.

But this subjection of the use of a man's own property to the convenience of his neighbour is founded upon a supposed preëxisting right in his neighbour to have and enjoy the privilege which by such act is impaired. Therefore it is, that, by the ancient common law, no man could maintain an action against the owner of an adjoining tract of land, for interrupting the passage of the light or the air to a tenement unless the tenement thus affected was ancient, so that the plaintiff could prescribe for the privilege of which he had been deprived; upon the common notion of prescription, that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now, in such case of a grant presumed, it shall for the purposes of justice be further presumed that it was from the ancestor of the man interrupting the privilege, or from those whose estate he has; so as to control him in the use of his own property, in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common law principle which gives one neighbour an action against another, for making the same use of his property which he has made of his own. And it is a reasonable principle; for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted, or consented to, or acquiesced in, the use of the privilege.

It is true, that, of late years, the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And, indeed, the modern doctrine, with respect to easements and privileges, is but a necessary consequence of late decisions, that grants and title-deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his house in 1804, ten years before the commencement of his suit. So that, if the presumption of a grant were not defeated by showing the commencement of his title to be so recent, yet there is no case, where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his

neighbour's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house; and, indeed, they could not have remained so long, without the culpable negligence or friendly acquiescence of those who might originally have had a right to hinder or obstruct them. But a man who himself builds a house, adjoining his neighbour's land, ought to foresee the probable use by his neighbour of the adjoining land; and, by convention with his neighbour, or by a different arrangement of his house, secure himself against future interruption and inconvenience.

This seems to be the result of the cases anciently settled in England, upon the substance of nuisance or interruption of privileges and easements; and it seems to be as much the dictate of common sense and sound reason, as of legal authority.

The decisions cited by the counsel for the plaintiff, in support of this action, generally go to establish only the general principle, that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil law doctrine cited from Domat will be found, upon examination, to go no further than the common law upon the subject. For, although it is there laid down, that new works on a man's ground are prohibited, provided they are hurtful to others who have a right to hinder them; and that the person erecting them shall restore things to their former state, and repair the damages; from whence, probably, the common law remedy of abating a nuisance as well as recovery of damages: yet this is subsequently explained and qualified in another part of the same chapter, where it is said, that, if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title, or possession, he is not liable to damage for injurious consequences; unless he does it, not for his own advantage, but maliciously; and the damages shall be considered as casualties for which he is not answerable.

The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common law authorities, tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages, if by such use he should injure a building previously erected, is that of Slingsby v. Barnard, 1 Rolle, 430. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seized of a dwelling-house nuper edificatus, and that Barnard was seized of a house next adjoining; and that Barnard, and Ball under him, in making a cellar under Barnard's house, dug so near the foundation of the plaintiff's house, that they undermined the same, and one half of it fell. Judgment upon this declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration.

The report of this case is very short and unsatisfactory; it not appearing whether the defendant confined himself in his digging to his own land, or whether the house then lately built was upon a new or an old foundation. Indeed, it seems impossible to maintain that case upon the facts made to appear in the report, without denying principles which seem to have been deliberately laid down in other books, equally respectable as authorities.

Thus, in Sid. 167, upon a special verdict the case was thus: A., having a certain quantity of land, erected a new house upon part of it, and leased the house to B. and the residue of the land to C., who put logs and other things upon the land adjoining said house, so that the windows were darkened, &c. It was holden that B. could maintain case against C. for this injury. But the reason seems to be, that C. took his lease seeing that the house was there, and that he should not, any more than the lessor, render the house first leased less valuable by his obstructions. It was, however, decided in the same case, that, if one seized of land lease forty feet of it to A. to build upon, and another forty feet to B. to build upon, and one builds a house, and then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in Shewry v. Pigott, W. Jones, 145, for each one may make what advantage he can of his own. The principle of this decision is, that both parties came to the land with equal rights in point of time and title; and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated, as resolved by the court, that, if a stranger have the land adjoining to a new house, he may build new houses, &c., upon his land, and the other shall be without remedy, when the lights are darkened; otherwise, when the house first built was an ancient one.

In Rolle, Abr. 565, A., seized in fee of copyhold estate, next adjoining land of B., erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B., and B. afterwards digs his land so near the house of A., but on no part of his land, that the foundation of the house, and even the house itself, fall; yet no action lies for A. against B., because it was the folly of A. that he built his house so near to the land of B. For by his own act he shall not hinder B. from the best use of his own land that he can. And after verdict, judgment was arrested. The reporter adds, however, that it seems that a man, who has land next adjoining my land,

cannot dig his land so near mine, as to cause mine to slide into the pit; and, if an action be brought for this, it will lie.

Although, at first view, the opinion of Rolle seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neighbour's land, and the probable consequences to his neighbour, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbour. For, in so placing the house, the neighbour was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it; and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be.

The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbour at a convenient distance from him. He could not have maintained an action for obstructing the light or air; because he should have known, that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is, in fact, damnum absque injuria.

By the authority above cited, however, it would appear that for the loss of, or injury to, the soil merely, his action may be maintained. The defendants should have anticipated the consequences of digging so near the line; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

JONES v. WAGNER et al.

(66 Pa. St. 429.)

Supreme Court of Pennsylvania. Nov. 8, 1870.

Error to district court, Allegheny county.

M. W. Acheson, for plaintiffs in error. S. M. Raymond and C. B. M. Smith, for defendant in error.

THOMPSON, C. J. The piece of ground out of which the controversy in this case has arisen, formerly belonged to John Ormsby's estate, and in the partition of that estate in November, 1855, the minerals in, and the surface of the land were separated and made to constitute two separate and distinct properties or estates, without any restriction, limitation or servitude imposed on either, and were so allotted among two of Ormsby's heirs. The plaintiff claims title to the surface through the heir to whom it was allotted, and so do the defendants to the minerals from another heir to whom they were allotted.

The question in the court below and here, is whether the latter have by their unrestricted title, the right to mine and take out all the coal underlying the surface, without liability for injury thereto, or to buildings and improvements thereupon by subsidence or otherwise. The learned judge below reserved the point and submitted to the jury the question of injury; to what amount, and whether it arose from unskilful or negligent mining in not leaving sufficient pillars or props in the mine to sustain intact the surface. On this question the jury found for the plaintiff, and at a subsequent day the court ruled the reserved question also in his favor and entered judgment on the verdict. From this statement it will appear, that the only negligence or unskilfulness at all attributable to the defendants, if any, arose from not leaving sufficient pillars of coal or supports to sustain the surface, and this they undoubtedly did not, most probably under the belief that all the coals in the mine belonged to them by virtue of their purchase and title. This was certainly true with the exposition of such a right given by Baron Parke in Harris v. Ryding, 5 Mees. & W. 60. "I do not mean to say," observed that able judge, "that all the coal does not belong to the defendants, but they cannot get it without leaving proper supports."

The right of supports, ex jure naturæ, which the owner of the soil is entitled to receive from the minerals underneath, has, within comparatively a few years, received much attention in the courts in England, and the rule deducible from the cases in all the courts, the house of lords, exchequer and queen's bench, is, that where there is no restriction or contract to the contrary, the subterranean or mining property is subservient to the surface to the extent of sufficient supports to sustain the latter, or in default, there is liability to damages by the owners or workers of the former for any injury consequent thereon to the latter. This is fully supported by Harris v. Ryding, 5 Mees. & W. 60, determined at Easter term, 1839, in the exchequer; Humphries v. Brogden (1850) 1 Eng. Law & Eq. 251, in the queen's bench before Lord Campbell, C. J., and Patteson, Coleridge, and Erle, JJ. The whole question was there discussed most learnedly and ably by the Lord C. J., and the same result arrived at as had been in the court of exchequer, supra, and in the case of Earl of Glasgow v. Hurlet Alum Co. (house of lords, in 1850) 8 Eng. Law & Eq. 13. There are many other cases referred to in the English courts to the same effect, by Rog. Mines, p. 455 et seq. Among them are Rowbotham v. Wilson, 8 H. L. Cas. 348; Pennington v. Gallard, 9 Exch. 1, for the principle stated by the learned author at page 467: "That if an owner of lands grant a lease of the minerals beneath the surface with power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface, and so conversely, where the minerals are demised and the surface is retained by the lessor, there arises a prima facie inference at common law, upon every such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support." These citations prove two things, viz., that the owner of a mineral estate, if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate, of sufficient supports; consequently the failure to do so is negligence, and so may be declared upon. Humphries v. Brogden, supra.

A usage to mine without the observance of this duty by defendants must have been so ancient and uniform in the region in which the property is situated, as to amount to a custom or usage capable of controlling the rule of the common law cited above, and of becoming the law itself. One element of such a custom would be, that it is so ancient "that the memory of man runneth not to the contrary." This could not be, and was hardly pretended of the locality in question. Nor is it likely that in a business like mining bituminous coal, found only in the western counties of the state, there ever was any rule there other than that which would result from convenience.

As to the house in question damaged, it undoubtedly had a right to supports as incident to the ground on which it stood. What might be the consequence of building in an unreasonable manner, taking into view the mining rights beneath, on a question of the sufficiency of the supports, does not arise in this case and need not be decided.

We have no case strictly of authority in our books, nor do I find any in the books of our sister states. In most of them but little subterranean mining exists, and in others the question has not presented itself for adjudication. In none of the cases cited by the learned counsel from our state reports, is the question decided or intentionally touched; we therefore must rule the point for ourselves for the first time. The English cases referred to, and others which might be referred to, emanate from

great ability, and from a country in which mining, its consequences and effects, are more practical, and the experience greater, than in any other country of which we possess any knowledge. We think it safe, therefore, to follow its lead in this matter, and hold that in the case in hand, the recovery was right, predicated as it was of the want of sufficient supports in the mine to prevent the plaintiff's ground, house and orchard, from injury by subsiding into the cavity made in the earth by the removal of the coal. The upper and underground estates being several, they are governed by the same maxim which limits the use of property otherwise situated, "Sic utere tuo et alienum non laedas." We have no doubt but all the evils depreciated by the adoption of this rule will disappear under regulations adapted to each case of severance of the soil from the minerals. Contract may devote the whole minerals to the enjoyment of the purchaser, without supports, if the parties choose. If not, the loss by maintaining pillars or putting in props will necessarily come out of the value of the mineral estate. If at any time the public necessities may demand the pillars to be removed for fuel, we may safely assume that the same necessity will provide some rule which will be satisfactory in such a crisis. We think the case was well decided below, and that the judgment must be affirmed.

SACHEVEREL v. FROGATE.

(1 Vent. 161.)

Court of King's Bench. 1671.

In covenant, the plaintiff declared, that Jacinth Sacheverel seised in fee, demised to the defendant certain land for years, reserving £120 rent. And therein was a covenant; that the defendant should yearly, and every year, during the said term, pay unto the lessor, his executors, administrators and assigns the said rent; and sets forth, how that the lessor devised the reversion to the plaintiff, and for £120 rent since his decease he brought the action.

The defendant demanded oyer of the indenture, wherein the reservation of the rent was yearly during the term to the lessor, his executors, administrators and assigns, and after a covenant prout the plaintiff declared, and to this the defendant demurred.

It was twice argued at the bar, and was now set down for the resolution of the court, which Hale delivered with the reasons.

He said they were all of opinion for the plaintiff. For what interest a man hath, he hath it in a double capacity, either as a chattel, and so transmissible to the executors and administrators, or as an inheritance, and so in capacity of transmitting it to his heir.

Then if tenant in fee makes a lease, and reserves the rent to him and his executors, the rent cannot go to them, for there is no testamentary estate. On the other side, if lessee for 100 years should make a lease for 40 years, reserving rent to him and his heirs, that would be void to the heir.

Now a reservation is but a return of somewhat back in retribution of what passes; and therefore must be carried over to the party which should have succeeded in the estate if no lease had been made, and that has been always held, where the reservation is general.

So, though it doth not properly create a fee, yet 'tis a descendible estate; because it comes in lieu of what would have descended; therefore constructions of reservations have been ever according to the reason and equity of the thing.

If two joint-tenants make a lease, and reserve the rent to one of them, this is good to both, unless the lease be by indenture; because of the estoppel, which is not in our case, for the executors are strangers to the deed.

'Tis true, if A. and B. join in a lease of land, wherein A. hath nothing, reserving the rent to A. by indenture, this is good by estoppel to A. But in Earl of Clare's Case it was resolved, that where he and his wife made a lease reserving a rent to himself, and his wife and his heirs, that he might bring debt for the rent; and declare as of a lease made by himself alone, and the reservation to himself; for being in the case of a feme covert there could be no estoppel, although she signed and sealed the lease.

There was an indenture of demise from two joint-tenants reserving £20 rent to them both; one only sealed and delivered the deed, and brought debt for the rent, and declared of a demise of the moiety, and a reservation of £10 rent to him. And resolved that he might. Between Bond v. Cartwright, 2 Rolle, Abr. 453, pl. 21. And in the Common Pleas, Pas. 40 Eliz., tenant in tail made a lease reserving a rent to him and his heirs, it was resolved a good lease to bind the entail, for the rent shall go to the heir in tail along with the reversion, though the reservation were to the heirs generally. For the law uses all industry imaginable, to conform the reservation to the estate. Whitlock's Case, 8 Coke, 69b, is very full to this, where tenant for life, the remainder over so settled by limitation of uses, with power to the tenant for life to make leases, who made a lease reserving rent to him, his heirs and assigns.

Resolved, that he in the remainder might have the rent upon this reservation.

So put the case, that lessee for 100 years should let for 50, reserving a rent to him and his heirs during the term; I conceive this would go to the executor. 'Tis true, if the lessor reserved the rent to himself, 'tis held, it will neither go to the heir or executor: but in 27 Hen. VIII. p. 19, where the reservation is to him and his assigns, it is said, that it will go to the heir. And in the case at bar the words executors and administrators are void; then 'tis as much as if reserved to him and his assigns during the term, which are express words declaring the intent, and must govern any implied construction, which is the true and particular reason in this case.

The old books that have been cited have not the words during the term. Vide Lane, 256. Richmond v. Butcher, Cro. Eliz. 217, indeed is judged contrary in point, but that went upon a mistaken ground, which was the manuscript report 12 Edw. II. Whereas I suppose the book intended was, 12 Edw. III., Fitz. Assize, 86, for I have appointed the manuscript of Edw. II. (which is in Lincoln's Inn Library) to be searched, and there is no such case in that year of Edw. II. The case in the 12 Edw. III., is a man seised of two acres, let one, reserving rent to him, and let the other, reserving rent to him and his heirs; and resolved, that the first reservation should determine with his life, for the antithesis in the reservation makes a strong implication that he intended so. In Wotton and Edwin's Case, 5 Cro. Jac., the words of reservation were yielding and paying to the lessor, and his assigns. And resolved, that the rent determined upon his death. In that case there wanted the effectual and operative clause during the term.

The case of Sury v. Brown, is the same with ours in the words of reservation; and the assignee of the reversion brought debt, and did not aver the life of the lessor. And the opinion of Jones, Croke and Doderidge was for the plaintiff. Latch. 99.

The law will not suffer any construction to take away the energy of these words, during the term.

If a man reserves a rent to him or his heirs, 'tis void to the heir. 2 Inst. 214a. But in Mallory's Case, 5 Coke, 111b, where an abbot reserved a rent during the term to him or his successors, it was resolved good to the successor.

It is said in Bruduel's Case, 5 Coke, 9a, that if a lease be made for years, if A. and B. so long live, if one of them dies, the lease determines, because not said, if either of them so long lives. So it is in point of grant. But it is not so in point of reversion, for Pasch. 4 Jac. in the common pleas between Hill and Hill, the case was, a copyholder in fee (where the custom was for a widow's estate) made a lease by license, reserving rent to him and his wife during their lives (and did not say, or either of them), and to his heirs: it was resolved,

First, that the wife might have this rent, though not party to the lease.

Secondly, that though the rent were reserved during their lives, yet it should continue for the life of either of them; for the reversion, if possible, will attract the rent to it, as it were by a kind of magnetism.

KOHL et al. v. UNITED STATES.

(91 U. S. 367.)

Supreme Court of the United States. Oct., 1875.

E. W. Kittredge, for plaintiffs in error. Edwin B. Smith, Asst. Atty. Gen., for the United States.

Mr. Justice STRONG delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vatt. c. 20, 34; Bynk. lib. 2, c. 15; Kent, Comm. 338–340; Cooley, Const. Lim. 584 et seq. But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the constitution. In Ableman v. Booth, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? In Cooley, Const. Lim. 526, it is said: "So far as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions,—as must sometimes be necessary in the case of forts, light-houses, and military posts or roads, and other conveniences and necessities of government,—the general government may exercise the authority as well within the states as within the territory under its exclusive jurisdiction; and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating is existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority." We refer also to Trombley v. Humphrey, 23 Mich. 471; 10 Pet. 723; Dickey v. Turnpike Co., 7 Dana, 113; McCullough v. Maryland, 4 Wheat. 429.

It is true, this power of the federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in Gilmer v. Lime Point, 18

Cal. 229, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in Burt v. Insurance Co., 106 Mass. 356, where land was taken under a state law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own action. The question was, whether the state could take lands for any other public use than that of the state. In Trombley v. Humphrey, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. The act of congress of March 2, 1872 (17 Stat. 39), gave authority to the secretary of the treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding $300,000; and a proviso to the act declared that no money should be expended in the purchase until the state of Ohio should cede its jurisdiction over the site, and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the secretary of the treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all, if congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the secretary the right to invoke it?

But it is contended on behalf of the plaintiffs in error that the circuit court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the circuit court to secure it. Doubtless congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the circuit court; but this, we think, was not necessary. The investment of the secretary of the treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The judiciary act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any act of congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the circuit court. That it is a "suit" admits of no question. In Weston v. Charleston, 2 Pet. 464, Chief Justice Marshall, speaking for this court, said: "The term ["suit"] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the circuit court has jurisdiction (Green v. Liter, 8 Cranch, 229); so has habeas corpus. Holmes v. Jamison, 14 Pet. 564. When, in the eleventh section of the judiciary act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the

agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least quasi judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses; and it is argued that no one but congress could prescribe in either case that the valuation should be made in a judicial tribunal or in a judicial proceeding, although it is admitted that the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted, it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there appears to be no reason for holding that the proper circuit court has not jurisdiction of the suit, under the general grant of jurisdiction made by the act of 1789.

The second assignment of error is, that the circuit court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest; but the court overruled their demand, and required that the jury should appraise the value of the lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial, the court required the lessor and the lessees each separately to state the nature of their estates to the jury, the lessor to offer his testimony separately, and the lessees theirs, and then the government to answer the testimony of the lessor and the lessees; and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this that the lessees complain. They contend, that whether the proceeding is to be treated as founded on the national right of eminent domain, or on that of the state, its consent having been given by the enactment of the state legislature of Feb. 15, 1873 (70 Ohio Laws, p. 36, § 1), it was required to conform to the practice and proceedings in the courts of the state in like cases. This requirement, it is said, was made by the act of congress of June 1, 1872. 17 Stat. 522. But, admitting that the court was bound to conform to the practice and proceedings in the state courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio, it was regular to institute a joint proceeding against all the owners of lots proposed to be taken (Giesy v. Railroad Co., 4 Ohio St. 308); but the eighth section of the state statute gave to "the owner or owners of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the state courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels. It hath this extent: no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be subserved by it. The circuit court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask. The judgment of the circuit court is affirmed.

Mr. Justice FIELD (dissenting).

Assuming that the majority are correct in the doctrine announced in the opinion of the court,—that the right of eminent domain within the states, using those terms not as synonymous with the ultimate dominion or title to property, but as indicating merely the right to take private property for public uses, belongs to the federal government, to enable it to execute the powers conferred by the constitution,—and that any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals or the will of state legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of congress conferring upon them such authority. The judiciary act of 1789 only invests the circuit courts of the United States with jurisdiction, concurrent with that of the state courts, of suits of a civil nature at common law or in equity; and these terms have reference to those classes of cases which are conducted by regular pleadings between parties, according to the established doctrines prevailing at the time in the jurisprudence of England. The proceeding to ascertain the value of property which the government may deem necessary to the execution of its powers, and thus the compensation to be made for its appropriation, is not a suit at common law or in equity, but an inquisition for the ascertainment of a particular fact as preliminary to the taking; and all that is required is that the proceeding shall be conducted in some fair and just mode, to be provided by law, either with or without the intervention of a jury, opportunity being

afforded to parties interested to present evidence as to the value of the property, and to be heard thereon. The proceeding by the states, in the exercise of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose. It can hardly be doubted that congress might provide for inquisition as to the value of property to be taken by similar instrumentalities; and yet, if the proceeding be a suit at common law, the intervention of a jury would be required by the seventh amendment to the constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the circuit courts of the United States are invested by the eleventh section of the judiciary act, goes beyond previous adjudications, and is in conflict with them.

Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation, and a voluntary conveyance of the property: the other implies a compulsory taking, and a contestation as to the value. Beekman v. Railroad Co., 3 Paige, 75; Railroad Co. v. Davis, 2 Dev. & B. 465; Willyard v. Hamilton, 7 Ham. (Ohio) 453; Livingston v. Mayor, etc., 7 Wend. 85; Koppikus v. Commissioners, 16 Cal. 249.

For these reasons, I am compelled to dissent from the opinion of the court.

MOORE v. ROBBINS.

(96 U. S. 530.)

Supreme Court of the United States. Oct., 1877.

Error to the supreme court of the state of Illinois.

Philip Phillips, for plaintiff in error. R. E. Williams, contra.

Mr. Justice MILLER delivered the opinion of the court.

This case is brought before us by a writ of error to the supreme court of the state of Illinois.

In its inception, it was a bill in the circuit court for De Witt county, to foreclose a mortgage given by Thomas I. Bunn to his brother Lewis Bunn, on the south half of the south-east quarter and the south half of the south-west quarter of section 27, township 19, range 3 east, in said county. In the progress of the case, the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land; and they were made defendants, and answered.

Moore said that he was the rightful owner of forty acres of the land mentioned in the bill and mortgage, to wit, the south-west quarter of the south-west quarter of said section, and had the patent of the United States giving him the title to it.

Davis answered that he was the rightful owner of the south-east quarter of said south-west quarter of section 27. He alleges that John P. Mitchell bought the land at the public sale of lands ordered by the president for that district, and paid for it, and had the receipt of the register and receiver, and that it was afterwards sold under a valid judgment and execution against Mitchell, and the title of said Mitchell came by due course of conveyance to him, said Davis.

It will thus be seen, that, while Moore and Davis each assert title to a different forty acres of land covered by Bunn's mortgage to his brother, neither of them claim under or in privity with Bunn's title, but adversely to it.

But as both parties assert a right to the land under purchases from the United States, and since their rights depend upon the laws of the United States concerning the sale of its public lands, there is a question of which this court must take cognizance.

As regards Moore's branch of the case, it seems to us free from difficulty.

The evidence shows that the forty acres which he claims was struck off to him at a cent or two over $2.50 per acre, at a public land sale, by the officers of the land district at Danville, Ill., Nov. 15, 1855; that his right to it was contested before the register and receiver by Bunn, who set up a prior pre-emption right. Those officers decided in favor of Bunn; whereupon Moore appealed to the commissioner of the general land office, who reversed the decision of the register and receiver, and on this decision a patent for the land was issued to Moore, who has it now in his possession.

Some time after this patent was delivered to Moore, Bunn appealed from the decision of the commissioner to the secretary of the interior, who reversed the commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent, and the land department did not venture to issue another for the same land; and so there is no question but that Moore is vested now with the legal title to the land, and was long before this suit was commenced. Nor is there, in looking at the testimony taken before the register and receiver and that taken in the present suit, any just foundation for Bunn's pre-emption claim. We will consider this point more fully when we come to the Davis branch of the case.

Taking this for granted, it follows that Moore, who has the legal title, is in a suit in chancery decreed to give it up in favor of one who has neither a legal nor an equitable title to the land.

The supreme court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore on the ground that to the officers of the land department, including the secretary of the interior, the acts of congress had confided the determination of this class of cases; and the decision of the secretary in favor of Bunn, being the latest and the final authoritative decision of the tribunal having jurisdiction of the contest, the courts are bound by it, and must give effect to it. Robbins v. Bunn, 54 Ill. 48.

Without now inquiring into the nature and extent of the doctrine referred to by the Illinois court, it is very clear to us that it has no application to Moore's case. While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land-office. Not only has it passed from the land-office, but it has passed from the executive department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other rec-

ognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course.

"A patent," says the court in U. S. v. Stone, 2 Wall. 525, "is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England, this was originally done by scire facias; but a bill in chancery is found a more convenient remedy." See, also, Hughes v. U. S., 4 Wall. 232, 11 How. 552.

If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the president, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.

If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded.

The order of the secretary of the interior, therefore, in Moore's case, was made without authority, and is utterly void, and he has a title perfect both at law and in equity.

The question presented by the forty acres claimed by Davis is a very different one. Here, although the government has twice sold the land to different persons and received the money, it has issued no patent to either, and the legal title remains in the United States. It is not denied, however, that to one or the other of the parties now before the court this title equitably belongs; and it is the purpose of the present suit to decide that question.

The evidence shows that on the same day that Moore bought at the public land sale the forty acres we have just been considering, Mitchell bought in like manner the forty acres now claimed by Davis; to wit, Nov. 15, 1855. He paid the sum at which it was struck off to him at public outcry, and received the usual certificate of purchase from the register and receiver. On the twentieth day of February, 1856, more than three months after Mitchell's purchase, Thomas I. Bunn appeared before the same register and receiver, and asserted a right, by reason of a pre-emption commenced on the eighth day of November, 1855, to pay for the south half of the south-west quarter and the south half of the south-east quarter of section 27, which includes both the land of Moore and Davis in controversy in this suit, and to receive their certificates of purchase. They accepted his money and granted his certificate. A contest between Bunn on the one side, and Moore and Mitchell on the other, as to whether Bunn had made the necessary settlement, was decided by those officers in favor of Bunn; and on appeal, as we have already shown, to the commissioner, this was reversed, and finally the secretary of the interior, reversing the commissioner, decided in favor of Bunn. But no patent was issued to Mitchell after the commissioner's decision, as there was to Moore; and the secretary, therefore, had the authority, undoubtedly, to decide finally for the land department who was entitled to the patent. And, though no patent has been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land.

The supreme court of Illinois, in their opinion in this case, come to the conclusion that this final decision of the secretary is not only conclusive on the department, but that it also excludes all inquiry by courts of justice into the right of the matter between the parties.

The whole question, however, has been since that time very fully reviewed and considered by this court in Johnson v. Towsley, 13 Wall. 72. The doctrine announced in that case, and repeated in several cases since, is this:

That the decision of the officers of the land

department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief.

In the recent case of Shepley v. Cowan, 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice Field: "The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

Applying to the case before us these principles, which are so well established and so well understood in this court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the land department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it.

In the recent case of Atherton v. Fowler, 96 U. S. 513, we had occasion to review the general policy and course of the government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale or by pre-emption. In the enforcement of this policy, the act of September 14, 1841, which for the first time established the general principle of pre-emption, and which has remained the basis of that right to this day, while it allowed persons to make settlements on the public lands as soon as the surveys were completed and filed in the local offices, affixed to such a settlement two conditions as affecting the right to a pre-emption. One of these was that the settler should give notice to the land-office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the fourteenth section of that act:

"This act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the president, nor shall any of the provisions of this act be available to any person who shall fail to make the proof of payment and file the affidavit required, before the commencement of the sale aforesaid." 5 Stat. 457.

There can be no misconstruction of this provision, nor any doubt that it was the intention of congress that none of the liberal provisions of that act should stand in the way of a sale at auction of any of the public lands of a given district where the purchase had not been completed by the payment of the price before the commencement of the sales ordered by the president's proclamation. We do not decide, because we have not found it necessary to do so, whether this provision is applicable under all the pre-emption laws passed since the act of 1841, though part of it is found in the Revised Statutes (section 2282), as part of the existing law. But we have so far examined all those laws enacted prior to November, 1855, the date of Mitchell's purchase, as to feel sure it was in full operation at that time. The act of March 3, 1853, extending the right of pre-emption to the alternate sections, which the government policy reserved in its numerous grants to railroads and other works of internal improvement, required the pre-emptor to pay for them at $2.50 per acre, before they should be offered for sale at public auction. 10 Stat. 244. This was only two years and a half before these lands were sold to Mitchell, and they were parts of an alternate section reserved in a railroad grant. That statute, in its terms, was limited to persons who had already settled on such alternate sections, and it may be doubted whether any right of pre-emption by a settlement made afterwards existed under the law. But it is unnecessary to decide that point, as it is beyond dispute that it required in any event that the money should be paid before the land was offered for sale at public auction.

The record of this case shows that, while Bunn's pre-emption claim comes directly within the provision of both statutes, they were utterly disregarded in the decision of the secretary of the interior, on which alone his case has any foundation.

We have no evidence in this record at what time the president's proclamation was issued, or when the sales under it began at which Mitchell purchased. These proclamations are not published in the statutes as public laws, and this one is not mentioned in the record. But we know that the public lands are never offered at public auction until after a proclamation fixing the day when and the place where the sales begin. The record shows that both Moore and Mitchell bought and paid for the respective forty-acre pieces now in contest, at public auction. That they were struck off to

them a few cents in price above the minimum of $2.50, below which these alternate sections could not be sold, and that this was on the fifteenth day of November, 1855. These public sales were going on then on that day, and how much longer is not known, but it might have been a week, or two weeks, as these sales often continue open longer than that.

Bunn states in his application, made three months after this, that his settlement began on the 8th of November, 1855. It is not apparent from this record that he ever gave the notice of his intention to pre-empt the land, by filing what is called a declaration of that intention in the land-office. There is a copy of such a declaration in the record accompanying the affidavit of settlement, cultivation, and qualification required of a pre-emptor, which last paper was made and sworn to Feb. 20, 1856, when he proved up his claim, and paid for and received his certificate. There is nothing to show when the declaration of intention was filed in the office.

Waiving this, however, which is a little obscure in the record, it is very clear that Bunn "failed to make proof of payment, and failed to file the affidavit of settlement required, before the commencement of the sale" at which Mitchell bought. The statute declares that none of the provisions of the act shall be available to any person who fails to do this. The affidavit and payment of Bunn were made three months after the land sales had commenced, and after these lands had been sold.

The section also declares that the act shall not delay the sale of any public land beyond the time which has been or may be appointed by the proclamation of the president. To refuse Mitchell's bid on account of any supposed settlement, even if it had been brought to the attention of the officers, would have been to delay the sale beyond the time appointed, and would, therefore, have been in violation of the very statute under which Bunn asserts his right.

Whatever Bunn may have done on the 8th of November, and up the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction, unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make was made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events, we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one, vesting in them the equitable title, with right to receive the patents; and that the subsequent proceedings of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the court in Illinois, sitting as a court of equity, to have declared that the mortgage made by Bunn, so far as these lands are concerned, created no lien on them, because he had no right, legal or equitable, to them.

The decree of the supreme court of that state must be reversed, and the cause remanded to that court for further proceedings in accordance with this opinion; and it is so ordered.

CITY OF JOLIET et al. v. WERNER.

(46 N. E. 780.)

Supreme Court of Illinois. April 3, 1897.

Appeal from circuit court, Will county; Dorrance Dibell, Judge.

Suit by Charles Werner against the city of Joliet and another. Decree for complainant. Defendants appeal. Affirmed.

C. McNaughton, for appellants. E. Phelps, for appellee.

MAGRUDER, C. J. This is a bill filed by appellee, as owner of lot 3 and the east half of lot 2 of Joel A. Matteson's subdivision of the north half of block 17 of Bowen's addition to Joliet, for the purpose of enjoining said city and its superintendent of streets from taking any proceedings to move the sidewalk in front of appellee's lots north of the present location of said sidewalk. The bill was answered by the appellants, and a decree was entered in favor of appellee, granting the injunction substantially as prayed for. The present appeal is from the decree so entered.

The question in controversy relates to the location of the north line of Jefferson street, upon which appellee's lots front. The sidewalk in front of the lots is 8 feet wide, resting upon a stone wall on the south side thereof and another stone wall on the north side thereof. Under this sidewalk runs a sewer. The stone wall on the north side of the sidewalk was built as far back as 1856 or 1857, and upon the same a fence was at that time erected. It is contended by appellants that the correct north line of Jefferson street is 8.3 feet north of the north line of said sidewalk, while appellee contends that the north line of said sidewalk is the correct north line of Jefferson street. In other words, the claim of the city is that the north line of Jefferson street is about 8 feet north of the north line of the sidewalk, while appellee contends that said strip, 8 feet wide, north of the north line of the sidewalk, is within his inclosure, and is his property. If the sidewalk were extended north 8.3 feet, in accordance with the contention of the city, it would not only take a strip of land, 6.4 feet wide, between the south line of appellee's house and the north line of the sidewalk, but it would also take nearly 2 feet off the south side of appellee's house. The part of Jefferson street lying south of the north half of block 17 runs eastward from Michigan street, on the west, to Eastern avenue, on the east. In 1853, when appellee bought lot 3, Jefferson street ran no further towards the east than Michigan street, and was not then open from Michigan street to Eastern avenue. In the fall of 1853, appellee and two other parties, whose interests he very soon acquired, bought the lots now in controversy from Joel A. Matteson; giving their notes therefor, with the understanding that deeds should be made upon the payment of the notes. Appellee did not receive his deed of lot 3 from Matteson until September 19, 1856. When these lots were bought of Matteson, he had a survey made, in order to show the south line of the lots sold by him, or the north line of what was to be Jefferson street. Upon the line thus surveyed under Matteson's order, stakes were set; and when he sold the lots he pointed out to appellee and the other purchasers these stakes, as indicating the line to be adopted as the north line of the street. The line in which the stakes were thus set was located 8 feet and 3 inches south of what would have been the north line of Jefferson street if that part of Jefferson street then existing west of Michigan street had been extended east of Michigan street. The line thus pointed out by Matteson to appellee and the other purchasers, and upon which the stakes had been set by the surveyor, corresponds with the line which is now the north line of the sidewalk in front of appellee's lots. At the time the lots were purchased the plat of Matteson's subdivision of the north half of block 17 had not been recorded. The plat shows upon its face that it was made on December 9, 1854, but that it was not acknowledged until the 12th day of March, 1859, and not recorded until March 15, 1859. After the purchase of his lots, in the fall of 1853 and in March, 1854, appellee and the other purchasers took possession of their respective lots, and began the erection of houses upon them; appellee's house being finished in May or June of 1854. Appellee has lived in the house so erected by him from that time up to the present time, or over 40 years before the filing of the bill herein. Not more than 2 or 3 years after the building of his house, the stone wall on the north line of the sidewalk was erected, and the fence set up on top of it; and, as we understand the evidence, the 8 feet and 3 inches north of this fence have been inclosed by appellee ever since that time,—more than 35 years. The sidewalk in question was built as early as 1854 or 1855. It was originally constructed by appellee, but it was, by ordinance, accepted by the city, and a sidewalk upon the same line was constructed by the city. The city levied and collected an assessment to pay for that portion of the walk built by its order. The city directed its surveyor to superintend the work of constructing the sidewalk located where the present sidewalk is located. The street between the south side of the sidewalk, as thus originally located, and the north side of the sidewalk on the south side of Jefferson street, has been several times graveled by the city. Some 30 years ago the city also built a culvert running from the north side of the sidewalk, as thus located, to the south side of the sidewalk on the south side of the street.

It is claimed by appellants that if that portion of Jefferson street west of Michigan

street had been extended or continued eastward to Eastern avenue, so as to make Jefferson street between Michigan street and Eastern avenue a continuation of that part of Jefferson street which was west of Michigan street, the north line of Jefferson street would be 8 feet and 3 inches north of the north line of the present sidewalk, and would have the location claimed for it by the city. It is also claimed by appellants that their contention as to the location of the north line of Jefferson street is sustained by the plat of Matteson's subdivision of the north half of said block 17. But it is nevertheless a fact that appellee and the other purchasers named, whose interests he now holds, took possession of their lots and built their houses, and built their walls and fences, upon the line pointed out by their grantor, Matteson, who then owned the ground, as being the north line of Jefferson street, and in which the stakes by which they were guided were set up by Matteson's surveyor. By the terms of the act then in force, "The plat or map when made out, certified, acknowledged and recorded * * * shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed." Gross' St. Ill. 1871, p. 102. If, therefore, the plat of Matteson's subdivision vested in the city the title to Jefferson street, according to the location and dimensions of that street as indicated upon the plat, it was only after such plat was acknowledged and recorded. But appellee's interest was acquired, and his possession was taken, and his house, wall, and fence were erected, in the manner stated, some six years before the plat was acknowledged or recorded. Even if the surveyor employed by Matteson made a mistake in putting the stakes 8 feet south of the proper line, still such error could not be corrected by the city, more than 40 years after appellee so acquired his title and obtained his possession, by forcing the location of the sidewalk 8 feet further north, to the proper line. Matteson, being the owner of the land, had the right to manage and dispose of it as he saw proper, and had a right to locate the street where he saw proper. The stakes, which were driven in the line pointed out by him, and made by his surveyor, were definite and fixed monuments, while a plat, indicating courses, distances, and quantities, is but a description or evidence assisting in determining the monuments. Where a party lays off lots on his own ground, which are marked by stakes or other visible monuments, and conveys with reference to such boundaries, the grantee will take the same according to the line as actually run and established, although the grantor may have been mistaken as to the correct location of the line. The fact of such mistake affords no reason for changing the boundary established by him in making his conveyance, and such a change would be manifestly unjust where parties have acquired rights extending over a period of more than 40 years. Under such circumstances, the location of the street as it was originally made, and as it has been occupied and used for so long a period, cannot be disregarded, and new lines cannot be established. A grantee has a right to the land as located by the grantor. Lull v. City of Chicago, 68 Ill. 518; City of Mt. Carmel v. McClintock, 155 Ill. 612, 40 N. E. 829; Fisher v. Bennehoff, 121 Ill. 426, 13 N. E. 150.

We are, moreover, of the opinion that the city is equitably estopped from tearing up the present sidewalk and erecting it further north by reason of its acts of recognition of the present location of the sidewalk, as such acts have been above described. Its construction of a sidewalk upon the line of the present sidewalk, its acceptance of the sidewalk already constructed by appellee, the building by it of a culvert up to the present line of the sidewalk, the graveling by it of the street along the present line of the sidewalk, and its levy of an assessment for the purpose of paying the cost of building the walk as at present located, are such positive acts as work an estoppel. While it cannot be maintained that, as respects public rights, municipal corporations are within ordinary limitation statutes, yet the principle of estoppel in pais may be applied to such acts by a municipal corporation as have been above designated. In applying the principle of an estoppel in pais, the courts are left to decide the question, not by the mere lapse of time, but by all the circumstances of the case, and to hold the public estopped, or not, as right and justice may require. Railroad Co. v. City of Joliet, 79 Ill. 25; City of Peoria v. Johnston, 56 Ill. 45; City of Mt. Carmel v. McClintock, supra; Martel v. City of East St. Louis, 94 Ill. 69. "When a municipal corporation threatens to remove plaintiff's fences, as an alleged encroachment upon a street, plaintiff having for thirty years been in the undisturbed possession of the premises,—the city having used no portion thereof for a street, and offering no compensation to plaintiff, and no means of adjusting his compensation for the property to be taken,—an appropriate case is presented for relief by injunction." High, Inj. § 584. A city may be restrained from encroaching upon the property of a private citizen, even under the pretense of preventing the obstruction of a street. High, Inj. §§ 349, 1247, 1272, 1274; Carter v. City of Chicago, 57 Ill. 283; City of Peoria v. Johnston, supra.

In view of the considerations herein presented, we are of the opinion that the decree of the court below, granting a permanent injunction against the removal of the sidewalk north of its present location, was proper. Accordingly the decree of the circuit court is affirmed. Affirmed.

MILLER et al. v. MEERS et al.

(40 N. E. 577, 155 Ill. 284.)

Supreme Court of Illinois. April 1, 1895.

Error to circuit court, Will county; Dorrance Dibell, Judge.

Bill by America Miller, Arvilla Withrow, Edith Gertrude Bissell, Alcyone Bissell, Ione M. Sings, Martin C. Bissell, and William Bissell against Robert Meers and Asa F. Mather (survivors of William A. Strong), executors and trustees under the last will and testament of Martin C. Bissell, deceased, William Grinton, and others. Defendants obtained a decree. Complainants bring error. Reversed.

Plaintiffs in error, the seven children of William P. Bissell, filed their bill in equity in the circuit court of Will county against defendants in error, as executors and trustees under the last will of Martin C. Bissell, deceased, and against William Grinton and others, to compel the delivery to complainants of a deed executed to them by said Martin, in his lifetime, for certain real estate situated in Joliet, called the "Bissell Hotel Property," and to confirm and establish the title to said property in said plaintiffs. William P. Bissell, also, was made defendant to the bill. The executors filed a cross bill to compel the cancellation and delivery to them of said deed, and also of a life lease executed at the same time by said Martin to said William P. Bissell and wife. Issues were made on the bill and cross bill, and on a hearing the circuit court decreed that the bill be dismissed, and that the relief prayed by the cross bill be granted, and that the complainants pay the costs. This writ of error is brought by the complainants to reverse that decree.

The principal facts set up in the pleadings and established by the proofs are, in substance, as follows: Martin C. Bissell, the owner of the property in question, resided in Joliet, and was a man of considerable wealth. His wife was living, but they had no children. He had permitted his brother William P. Bissell, the father of plaintiffs in error, who was possessed of small means, to occupy and run the hotel property for a number of years upon terms disclosed only by the testimony of said William, held by the court to be incompetent. The evidence does not, however, disclose that William had ever paid, or agreed to pay, any rent. In 1875, while William, with his wife and three minor children, were thus occupying the property, his adult children having established themselves in other parts of the country, Martin and his wife executed and acknowledged a warranty deed of the hotel property to plaintiffs in error, naming them, and as the children of said William, for the expressed consideration of one dollar and natural love and affection, and at the same time Martin executed and delivered to William and his wife a life lease to the same property. The deed recited that it was subject to the lease. The deed was drawn by the defendant William Grinton at Martin's request. Grinton also attested its execution, as a witness, and, as a notary public, took the grantors' acknowledgment. The certificate was in the usual form, certifying that the grantors acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein expressed. The lease was executed by Martin, as lessor, and William and his wife, as lessees; was delivered to William and his wife; purported to be for the term of their "natural lives," and upon the consideration that the lessees should pay all taxes, keep the premises in as good condition as when received, and keep the buildings insured,—three-fourths of the insurance for the benefit of the lessees, and one-fourth for their children, the plaintiffs in error. The lease also contained the following: "And it is further expressly agreed by and between the parties hereto that in case said premises should at any time be sold for taxes or assessments, and said party of the second part should fail to redeem said premises from such sale at least three months before the time of redemption from said sale expires, or if said parties of the second part shall both at any time cease to personally occupy said premises (loss or damage by fire or inevitable accident excepted), then and in either of said last-named events the said children of said William P. Bissell above named shall have the right, at their election, to declare said term ended, anything herein to the contrary notwithstanding, and the said demised premises, or any part thereof, to enter, and the said party of the second part, or any other person or persons occupying in or upon the same, to expel, remove, or put out, using such force as may be necessary in so doing." The deed and lease were dated January 11, 1875, but the acknowledgment was taken March 31, 1875. Some time in 1877, because of some domestic trouble, William's wife left him, and went to a distant city to live with her sister, taking some of their younger children with her, and about six months thereafter William left the premises, also, and removed to Chicago; he and his wife having permanently separated, and neither of them, nor their children, having since then occupied the property. When Martin C. Bissell and wife executed the deed to plaintiffs in error, he left it with Grinton, the notary, and told him to take it and take care of it, giving no other directions respecting it. Grinton put it in an envelope, and placed it in the safe in the office where he and Martin were engaged in business. He was then transacting business for Martin C. Bissell and himself under a contract by which he received a certain share of the profits. The private papers of each, as well as their partnership papers, were kept in the safe. Grinton retained possession of the deed until he produced it in court after the death

of Martin C. Bissell,—a period of about 15 years. He testified that it had never been out of his hands since it was placed there by Bissell, the grantor; and it does not appear that any one ever asked him for the deed until it was demanded by plaintiffs in error, shortly before the filing of this bill. After William P. Bissell left the property, in 1877, Martin C. Bissell took charge of it, collected the rents, and paid the taxes on it, and kept it in repair, the collections exceeding the disbursements by only a small amount. Plaintiffs in error claim this was done by agreement between him and his brother William, while defendants insist it was done as the owner, in the exercise of his ownership of the property. Two witnesses (Stevens and Dirkman) testified that during this period Martin told them at different times that the property belonged to his brother's children. One of these witnesses,—an old neighbor of Martin's and who had formerly owned the property,—seeing that it "was running down," inquired of him about the property, and proposed to purchase it, but Martin told him he could not sell it; that it was not his; that he had deeded it to his brother's children, and had given his brother a life lease on it; that his brother had full control of it before he went to Chicago, but had allowed it to run to waste; and that he had paid the taxes for the benefit of his brother. One of these conversations, the witness testified, occurred seven or eight years before the trial, which took place in 1890, and the other five or six months before Martin's death. In the last conversation this witness, Stevens, asked Martin why William did not take care of the property; and the reply was that William and his wife had parted, and he did not seem to take much charge of it. The other witness testified that some four years before the trial he was employed by Martin in whitewashing in the hotel. He was an elder or steward in the African Methodist Episcopal Church, and was interested in procuring a site for a church, and suggested to Mr. Bissell the idea of letting him have the property so that he "could turn it over for a church," but that Mr. Bissell replied that he could not let him have it; that it was his brother's children's property, and he would attend to it. Two witnesses (Grinton and Vose) testified for defendants that, after William P. Bissell left the property, Martin C. Bissell turned it over, first to Grinton, and then to Vose, who took charge of it, kept the account of collections and disbursements, and carried it on the books in Martin's name, and in the same manner as other property of Martin's. Vose testified that Martin tried to sell it, and in 1885 talked of trading it for land in Virginia. Vose claimed to have acquired an interest in the property, and had a suit pending against the executors to enforce it. Martin C. Bissell, by his will, after making various small bequests to plaintiffs in error and others, gave the bulk of his estate to defendants in error, in trust for certain religious purposes. The testator's property was not specifically described in the will.

Hill, Haven & Hill, for plaintiffs in error. Higgins & Akin, for defendants in error.

CARTER, J. (after stating the facts). The controverted question in this case is, did the title to the hotel property, subject to the lease to William P. Bissell, vest in plaintiffs in error by virtue of the deed of Martin C. Bissell and wife, or did the deed fail to take effect, because of nondelivery?

The first question to be determined is whether or not the trial court erred in admission of the testimony of the witnesses Olin and William P. Bissell. Judge Olin, who drew the will of Martin C. Bissell, was permitted, against the objection of plaintiffs, to testify that the testator, in making up the list of his property to be included in his will, included in the list the hotel property, and told him (the witness) that the provisions made in the will for plaintiffs were all he had given or intended to give them. The court had also, against the objections of the defendants, permitted the plaintiffs to prove by William P. Bissell that he went into the possession of the hotel more than 10 years before the deed and lease were made, under the promise of his brother to give it to him for life, with remainder to his children, and that he retained possession under such promise, without paying any rent, until the lease was made, and that when he left it, in 1877, he arranged with his brother to lease and take care of the property. In both of these rulings the trial court erred. The defendants were defending as the executors and trustees under the will of the deceased, and William P. Bissell was a party, and interested in the event of the suit, adversely to the estate. While it is true that the bill did not, in terms, seek to establish the lease, yet it set up the lease, as well as the deed, and the deed, on its face, purported to be subject to the lease. As between the grantees in the deed and the lessees, no forfeiture had ever taken place under the lease. If William's testimony was true, instead of abandoning the lease, and surrendering the property to the lessor, he only made arrangements with his brother to take care of the property for him; and his brother's subsequent control of the property was not that of owner, but simply as agent for him, as lessee, and for his children, as the owners of the fee. The cross bill sought to have both the lease and the deed delivered up and canceled. Both issues were tried together. The court decreed in favor of the defendants, and thus annulled the lease. Had the decree been in favor of the complainants, the effect would have been to establish the subsisting validity of the lease, as well as of the deed, and the estate would have been diminished. He was clearly incompetent, under the statute.

The testimony of the witness Olin as to the

statements of Martin C. Bissell made in his own favor long after the deed took effect, if it ever took effect, were also improperly received. The deed took effect in 1875, when it was executed, acknowledged, and delivered, if it ever was delivered. If the deed became effective in 1875, it would not be rendered inoperative by anything the grantor could say 10 years later. If it was a question to be determined from the evidence, as it certainly was, whether the deed did become effective or not in 1875, hearsay evidence, or the declarations of a party in interest, in his own favor, made long afterwards, in the absence of the other party, could not be received to aid in determining such question.

Counsel for defendants, however, strenuously contend that this testimony was proper, as showing that it was not the intention of the grantor that the deed should take effect as a voluntary settlement, and cite the following cases in support of their contention: Cline v. Jones, 111 Ill. 568; Bovee v. Hinde, 135 Ill. 148, 25 N. E. 694; Barnum v. Reed, 136 Ill. 398, 26 N. E. 572; and Price v. Hudson, 125 Ill. 287, 17 N. E. 817,—which last case, it is insisted by counsel, is conclusive of the question. We find nothing in that case changing the rule long established. This court there said: "Any disposition made of the deed by the grantor, with the intention thereby to make a delivery of it, so that it shall become presently effective as a conveyance of a title, will, if accepted by the grantee, constitute a sufficient delivery. 3 Washb. Real Prop. 288–293; Benneson v. Aiken, 102 Ill. 284. The intention to deliver, on the one hand, and of acceptance, on the other, may be shown by direct evidence of the intention, or may be presumed from acts or declarations—or both acts and declarations—of the parties constituting parts of the res gestae, which manifest such intention; and, in like manner, the presumption of a delivery may be rebutted and overcome by proof of a contrary intention, or of acts and declarations from which the contrary presumption arises. It is not competent to control the effect of the deed by parol evidence, when it has once taken effect by delivery; but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered, unless the grantor, or those claiming through him, are estopped in some way from asserting the nondelivery of the deed." Neither the facts in that case, nor the language used, warrant the inference drawn from the case by defendants' counsel, nor do the other cases cited lay down any different rule. As to whether Martin C. Bissell continued to deal with the property, and the grantees permitted him to continue to deal with it, as his own, after the execution of the deed, other witnesses were examined; but it was clearly erroneous to admit and consider the testimony of Judge Olin as to statements made to him by Mr. Bissell, when drafting his will, to the effect that he still owned the hotel property, and had never given it to plaintiffs in error. Guild v. Hill, 127 Ill. 523, 20 N. E. 665; Massey v. Huntington, 118 Ill. 80, 7 N. E. 269; Dickie v. Carter, 42 Ill. 377; Long v. Long, 19 Ill. App. 389; Id., 118 Ill. 638, 9 N. E. 247. These statements had no connection, either in time, place, or circumstance, with the statements made to the witnesses Stevens and Dirkman to the effect that the property belonged to his brother's children, and that he was attending to it for them and his brother, and did not tend to disprove such statements, as supposed by counsel. These latter statements were properly received as admissions by the grantor; as statements against his interest. They tended to show that he considered the deed as having taken effect, and that the title had vested in the grantees. They also tended to explain his acts in dealing with the property after having conveyed it.

But the question still arises whether or not, after considering all proper evidence and rejecting all held to be improper, the decree of the trial court can be sustained. "No particular form or ceremony is necessary to constitute a delivery" of a deed. "It may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." Bryan v. Wash, 2 Gilman, 557; Cline v. Jones, 111 Ill. 563, and cases there cited. It is well settled that the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially in favor of infants, than in ordinary cases of bargain and sale. The acceptance by the infant will be presumed. And it is even held that an instrument may be good as a voluntary settlement, though it be retained by the grantor in his possession until his death, providing the attending circumstances do not denote an intention contrary to that appearing upon the face of the deed. Bryan v. Wash and Cline v. Jones, supra; Reed v. Douthit, 62 Ill. 348; Walker v. Walker, 42 Ill. 311; Otis v. Beckwith, 49 Ill. 121; Masterson v. Cheek, 23 Ill. 72; Souverbye v. Arden, 1 Johns. Ch. 242; Bunn v. Winthrop, Id. 329; Scrugham v. Wood, 15 Wend. 545; Perry, Trusts, § 103; Urann v. Coates, 109 Mass. 581; Thompkins v. Wheeler, 16 Pet. 114. And it was said in Walker v. Christen, 121 Ill. 97, 11 N. E. 893, that "the crucial test, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done." The deed in question must have taken effect at once upon its acknowledgment and delivery to Grinton, or not at all; and the real question is, with what intention was the deed placed in the hands of

Grinton? Blackman v. Preston, 123 Ill. 385, 15 N. E. 42; Hayes v. Boylan, 141 Ill. 408, 30 N. E. 1041; Bovee v. Hinde, 135 Ill. 137, 25 N. E. 694; and cases supra. Nothing was said by the grantor at the time to indicate an intention that the deed should not take effect. His instructions were to take the deed, and take care of it,—whether for himself or the grantees, he did not say. The grantees were his nephews and nieces, seven in number; the adults living in different places, and the minors, with their father, his brother, on the premises conveyed. Under the circumstances, it may have been a question of some difficulty, in his mind, to determine to whom the deed should be delivered. Instead of delivering it to either of the grantees, he could lawfully deliver it to a third person for their benefit. He did deliver it to a third person, and whether for their benefit, or only as custodian for himself, is a question of fact, to be determined from the evidence. Defendants insist that Grinton was the grantor's clerk, and that his possession was the possession of the grantor. It is not clear from the evidence what the business relations were between Grinton and Martin C. Bissell. Grinton testified that he was not employed by the day, week, month, or year; that he always had a partnership contract with Mr. Bissell in the profits, and that that was the case when these papers were executed; that the "partnership papers," as witness called them, as well as his individual papers and those of Martin C. Bissell, were all kept in the safe. Whether he was responsible for the losses and expenses of the business is not disclosed by the evidence. From the evidence given, he may have been a partner in business with Bissell, or merely an employé receiving a share of the profits as a measure of his pay for his services. In Lockwood v. Doane, 107 Ill. 235, this court held that: "Where parties agree to share in the profits of business, the law will infer a partnership between them in the business to which the agreement refers, but this presumption may be disproved. It is prima facie evidence, and will control until rebutted." Niehoff v. Dudley, 40 Ill. 406. Under the evidence and these authorities, it would seem that the relation between Grinton and Martin C. Bissell, at the time of the transaction in question, must be treated as that of a partnership. If so, the transaction not pertaining to their partnership affairs, possession of the deed by Grinton was not, by virtue of their relation, the possession of the grantor, but was the possession of a third person. Grinton took this deed, and placed it in an envelope, and put it in the safe, and kept it in his possession for 15 years thereafter, until the trial in the circuit court. Had Martin intended to retain control of it, he could as well have placed it with his own papers in the safe. This he did not do, nor did he ever assume or assert any control over the deed afterwards. Grinton was a notary public, and as such took the acknowledgment. By this acknowledgment the grantors acknowledged that they signed, sealed, and delivered the instrument as their free and voluntary act, for the uses and purposes expressed in it. Whether, on an issue as to the delivery of a deed, otherwise left in doubt by the proofs, such an acknowledgment would be sufficient evidence of a delivery, it is not necessary in this case to decide; for, as we conceive, the intention of the grantor is otherwise disclosed by the evidence with sufficient clearness, and this, too, whether Grinton was a partner or a mere employé of Martin C. Bissell. We find nothing in the attending circumstances denoting an intention on the part of the grantor that the deed should not take effect; but, on the contrary, there is sufficient evidence that he intended the deed to become presently effective. He at the same time executed and delivered to his brother, the father of plaintiffs in error, and to his brother's wife, who were already in possession of the property, a life lease therefor. The deed was, on its face, made subject to the lease. By the lease the lessees were required to insure the property for the benefit, in part, for themselves, and in part for the grantees. The lease recognized the grantees as the owners of the property, and, for breach of any of the covenants in the lease, they were authorized to declare the term ended, and to enter and expel the lessees. The lease and deed were executed together, and were parts of the same transaction, whereby Martin C. Bissell disposed of all his interest in the possession of and title to the property. He reserved nothing in either the lease or deed. The delivery of the lease to, and the possession of the property by, William, are not disputed. The right to declare a forfeiture and to re-enter was not reserved to the lessor, but to plaintiffs in error, the grantees in the deed. It would seem from this provision that, at the time of the transaction, Martin C. Bissell intended that the title should vest in appellants; and that he understood it did so vest. Then, again, it was clearly proved that after William had left the property, and Martin had taken possession and made repairs, he leased it, paid the taxes, and, to all outward appearances, acted as the owner. He told two witnesses that the property belonged to his brother's children, and that he could not, for that reason, sell or dispose of it, but would attend to it,—evidently meaning that he was taking care of it for his brother and his brother's children. It may be that after the lapse of years he concluded that he was entitled to and would retain the property as his own. In other words, he may have changed his mind in reference to making a gift of the property to these beneficiaries, honestly concluding that under the circumstances he had a right to do so, but if he did so conclude he was simply mistaken as to the legal effect of what had been done. The facts are somewhat similar to those in Douglas v. West, 140 Ill.

461, 31 N. E. 403. See, also, Winterbottom v. Pattison, 152 Ill. 334, 38 N. E. 1050. We are satisfied from the evidence that Martin C. Bissell intended that the deed should take effect when he executed and acknowledged it and delivered it to Grinton, and it must be so held. The decree of the circuit court is reversed, and the cause remanded, with directions to dismiss the cross bill, and to enter a decree in accordance with the prayer of the bill of plaintiffs in error. Reversed and remanded.

CROWLEY et ux. v. C. N. NELSON LUMBER CO. et al.

(69 N. W. 321.)

Supreme Court of Minnesota. Dec. 8, 1896.

Appeal from district court, St. Louis county; Page Morris, Judge.

Action by Robert Crowley and wife against the C. N. Nelson Lumber Company and others. There was a finding for defendants, and from an order denying a new trial plaintiffs appeal. Affirmed.

H. H. Hoyt, for appellants. Warner, Richardson & Lawrence and Draper, Davis & Hollister, for respondents.

COLLINS, J. This action was originally brought against defendants lumber company, the Chicago & Minnesota Ore Company, and the Wyoming Iron Company, corporations, for the purpose of setting aside a deed of conveyance of the land in controversy,—160 acres,—executed and delivered by plaintiffs, husband and wife, to defendant lumber company, on the ground that it was procured by fraudulent representations and concealments. There were no allegations in the complaint that the ore company or the iron company were parties to the fraud; the only averment in reference to them being that each claimed to own or to have some interest in the land. After these defendants had answered, plaintiffs procured an order bringing the Auburn Iron Company, another corporation, into the case as an additional defendant,—not as a party to the alleged fraud, but as claiming to be the owner or having an interest in the land. The allegations in the complaint as to the procurement of the deed, in which plaintiffs were grantors and the lumber company grantee, by fraudulent practices, were put in issue by the answers filed by each of the defendants. The lumber company further alleged that on February 16, 1882, plaintiff Robert Crowley, then a resident of the state of Minnesota, had duly entered and purchased this land from the general government, in accordance with the provisions of the pre-emption act, and had become the equitable owner of the same; that on February 20, 1882, said Crowley, for a valuable consideration, namely, $500, sold the land to defendant lumber company, and on the same day duly executed, acknowledged, and delivered to one David McIntosh, for the use and benefit of the company, a deed of conveyance thereof, which was duly recorded in the office of the register of deeds for the proper county on March 1st of the same year. It was further alleged that on May 20th, following, McIntosh, for a valuable consideration, duly executed, acknowledged, and delivered his deed of that date, whereby he duly sold and conveyed the land in question to the lumber company, which deed was duly recorded May 26, 1882. A copy of each of these deeds was attached to the answer, from which it appeared that each contained full covenants of warranty. A copy of the deed alleged to have been procured by fraud was also made a part of the answer. It bore date December 5, 1893, was properly witnessed, and was duly acknowledged before a notary public, having a seal of office, in the province of Nova Scotia. The answer of defendant lumber company, as well as separate answers filed by the other defendants, set out the execution and delivery of a number of mining leases and contracts relating to the land in question, all bearing upon the title and interest in the land claimed by the defendants other than the lumber company. This company claimed to be the owner in fee simple, through the deeds before referred to, and averred that, at the time Robert Crowley conveyed to McIntosh, he was, in fact, a married man; that his wife, plaintiff Annie Crowley, was not at the time, and never had been, a resident of the state of Minnesota, or of the United States; and that the deed of December 5, 1893, was executed and delivered by the Crowleys and obtained by the lumber company for the sole purpose of completing its title to the land, and curing the defect which existed by reason of her failure to join in the execution of the deed in which McIntosh was grantee. Replies were interposed to the answers, in which it was denied that on the day mentioned in the year 1882, or at any time, Robert Crowley had sold the land to the lumber company, or had conveyed it to McIntosh or to any other person, or that McIntosh had at any time conveyed it to the company or to any one else. The issues made by these pleadings, and on which the case was tried by the court without a jury, were well defined, and may be thus stated: First. Did plaintiff Robert Crowley sell the land to the lumber company in 1882, and execute and deliver the warranty deed, bearing date February 20th of that year, in which McIntosh was named grantee? Second. Did McIntosh execute and deliver the warranty deed, dated May 20, 1882, in which the lumber company was named as grantee? And, third, was the deed executed and delivered by plaintiffs, December 5, 1893, in which the company was grantee, procured by means of fraudulent representations and concealments?

At the trial defendants' counsel offered in evidence a deed, containing full covenants of warranty, bearing date February 20, 1882, in which Robert Crowley was sole grantor and David McIntosh was grantee, in which was described and conveyed in fee simple the tract of land involved in this action. This instrument was executed and acknowledged before a notary public of this state in the manner prescribed by law, and, without further proof, was admissible in evidence, under the provisions of Gen. St. 1894, § 5759. This disposes of the assignment of error based upon the admission of this instrument in evidence, over plaintiffs' objection, without further proof of its execu-

tion. Counsel also introduced in evidence a deed, of date May 20, 1882, purporting to have been executed and delivered by McIntosh, as sole grantor, to the lumber company, as grantee, describing and conveying the land in question to the latter with full covenants of warranty. This deed was also executed and acknowledged within this state, in accordance with the laws thereof, and, without further proof, was also admissible in evidence. Both parties then introduced evidence in relation to the execution and delivery of these deeds. The testimony of Robert Crowley, who appeared as a witness, was an attempted denial of the execution or delivery of the deed in which he was named as grantor, while McIntosh, also a witness, denied that he knew of the execution of this deed, in which he was named as grantee, or that he ever received it, or that he at any time conveyed the land therein described to defendant lumber company. This included a positive denial that he executed or delivered the deed of May 20, 1882, in which he was named as grantor, and the company as grantee. The object of this testimony was to rebut and overcome the effect of the admission in evidence of what purported to be the original conveyances, and this is authorized by the provisions of section 5759, supra. Evidence on this point was also introduced by defendants. We need not state what it was, but from an examination of it, including the cross-examination of Crowley and McIntosh, we are not only convinced that the trial court was right when finding, as facts, that Crowley sold the land in February, 1882, to the lumber company, for a valuable and adequate consideration, paid to him by it; that on the 20th day of that month he duly executed, acknowledged, and delivered the deed, with full covenants of warranty, in which McIntosh was grantee; that this was done at the instance and request of the purchaser; and that thereafter, May 20, 1882, McIntosh duly executed, acknowledged, and delivered the deed to the purchaser lumber company, in which it was named as grantee,—but that any finding in opposition to these would have been against the decided weight of the evidence. It is argued by counsel that, in any event, the Crowley deed conveyed nothing, because the grantor did not know that McIntosh was named as grantee, and, again, because it was never delivered to the latter, it being shown that it never came into his actual possession. That McIntosh was named as grantee in the deed, Crowley being in ignorance of the fact, was of no consequence. Crowley might have insisted upon the name of the real purchaser being inserted as grantee, but the validity of his deed is not affected by the fact that it was not. The conveyance was not invalid because the name of a third party was inserted before its execution. It is also true that a deed must be delivered before it takes effect. But here was delivery to the actual purchaser. If McIntosh, then, chose to convey the land described to the lumber company while the deed was in its possession, as he did, he acquiesced in and assented to all that previously transpired, and the conveyance operated precisely as if he had knowingly been a party to all that had been done, and had actually received the Crowley deed in his own hands.

Counsel for plaintiffs dispose of a number of their assignments of error, in relation to the admission in evidence of a number of exhibits, quite summarily in their argument. We are of the opinion that the court did not err in its rulings, and that it is clearly unnecessary for us to discuss any of these assignments. And, obviously, the court ruled correctly when it refused to permit the witness McIntosh to state what occurred between the witness Gowan and himself when they met in the western country.

This brings us to a consideration of the appellants' main contention that the court was not warranted in finding, as a fact, that the quitclaim deed from them to defendant lumber company, of date December 5, 1893, was obtained without fraud, and was and is a valid deed of conveyance of the land in question. This is equivalent to asserting that the evidence required a finding that this deed was obtained by fraudulent representation or concealments, on which there should be based an order for judgment setting it aside. We cannot agree with counsel. At the outset, it is well to state that, when Crowley conveyed this land, in 1883, and for many years afterwards, it was supposed to be principally valuable for the pine timber then growing thereon. But later, and a few years prior to 1893, there was discovered upon it one of the richest deposits of iron ore ever found in that section of the country, and it became immensely valuable. This led to a close scrutiny of the title by the lumber company, and the discovery that Crowley was a married man when he conveyed to McIntosh. Further investigation disclosed that his wife was still living, both residing near Sidney, Province of Nova Scotia. A quitclaim deed of the land was then prepared, and the witness Gowan sent by the company to Sidney to secure its execution by Crowley and his wife. As to what occurred then, what was said and done by and between the parties, the trial court had the right to accept the version given by Gowan, and reject that of plaintiffs, although this may not be very material, in view of the fact, which is important, that Crowley had already sold, and by warranty deed conveyed, the land, and the only object in procuring the quitclaim was to perfect the title, affected, as it was, by the circumstance that Crowley was a married man when he deeded, and his wife had not joined in the deed. According to Gowan's version, he first met Crowley on the street in Sidney, and recognized him, they having been acquainted in 1882. After a little general conversation Gowan told Crowley what his purpose was in visiting Sidney, reminded him of the fact that Mrs. Crowley had not signed the original conveyance, and informed him that he came to obtain a quitclaim deed of the prop-

erty. Crowley expressed a willingness to have such a deed executed, and at his suggestion a certain notary public was secured to go to Crowley's house to take the acknowledgment. The notary and Gowan went together, arriving at the house before Mr. Crowley came in. There was more or less conversation between the notary and Mrs. Crowley before Mr. Crowley came in, but nothing was said about the deed. A lunch, prepared by Mrs. Crowley, was then eaten, and at the suggestion of the notary the parties proceeded to the execution of the deed. Gowan handed the quitclaim to be signed to the notary, and also the original deed from Crowley to McIntosh, telling him to compare the description to satisfy the Crowleys that they were the same. The notary spread both deeds on the table, made the examination, and assured the Crowleys that the land described was the same. Mr. and Mrs. Crowley then signed the deed, it was witnessed by two witnesses aside from the notary, the acknowledgment was taken, and the deed handed to Gowan. After this Crowley expressed a wish that Gowan go and look about the little place on which he was living, and also remarked that if Mr. Nelson (of the lumber company) had come himself to Sidney to obtain the deed he would have paid $30 or $40 for it. Gowan professed a willingness to pay, and handed $40 to Crowley, who immediately placed it in his wife's hands. This was the substance of what occurred when the deed was signed. Gowan admitted that he said nothing about the discovery of iron on the land, and also that he stated to the Crowleys that the fire had run through a part of the land, and that it was in a dangerous location, the timber liable to burn, and the company wanted the deed because the fires had run through the timber. He also admitted that he was asked if the land was valuable, to which he answered that all land was valuable in that locality. It stood admitted upon the trial that little or no damage had been done to the timber by fire when Gowan procured the deed, although there was evidence tending to show that he had been informed that fire had run through and injured it quite considerably. Gowan also admitted that, when asked about his visit to Sidney, he told Crowley that he had business in New Brunswick in respect to an estate. From the evidence it appeared that he went from Minnesota to Sidney direct, and returned immediately, having no other business. His statements in reference to other business were misrepresentations, at least. So that the acts of omission or commission relied upon by appellants were that Gowan concealed from them the fact that the land in question had become immensely valuable, stated that the fire had run through it so as to injure the timber, and for this reason the lumber company wanted a deed, and further misrepresented his reasons for being in that vicinity at that time.

Now, we are not required, as before intimated, to pass upon the facts in this case as if the transaction of December 5, 1893, was the first occurring between these parties. It is altogether different from an out and out purchase of the land by the lumber company upon that day, and the rules of law which would govern and control such a transaction have only a limited application here, and we need not discuss them. Crowley had, in 1882, sold, and by warranty deed with full covenants had conveyed, the land in fee simple. As to him the title was perfect in the company. Mrs. Crowley had an inchoate and contingent right in the land, which, in the event of her husband's death before her own, she not having assented in writing to a disposition thereof, would ripen into a title in fee in her to an undivided one-third, subject, in its just proportion with other real estate, to the payment of such debts of the deceased husband as were not paid from the personalty. This right is of the same general nature as inchoate right of dower at common law. The right was not assignable. It had no real value. It depended upon a contingency, and the only thing the wife could do with it, when Gowan obtained the deed, was to relinquish it in writing to the company, then owner of the fee. It was an incumbrance, within the scope of the covenants in her husband's deed. An incumbrance, within the meaning of the covenant against incumbrances, includes any right or interest in the land, which may subsist in third persons, to the diminution of the value of the land not consistent with the passing of the fee by the conveyance. Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702. A contingent right of dower is an existing incumbrance, within the covenant against incumbrances. 2 Scrib. Dower, § 3, and cases cited. That estates in dower eo nomine have been abolished in this state, and in lieu thereof there has been substituted a statutory right to a life estate in the homestead of the husband, and title in fee to an undivided one-third of all other lands, has not changed the rule. If anything, it has made its expediency and necessity more apparent. The obligation to remove this incumbrance devolved upon Mr. Crowley, the husband, and the right to enforce the obligation vested in the lumber company upon the execution and delivery to it of the McIntosh deed. It remained so vested when Gowan procured the deed of December 5, 1893, and it had not been affected by the discovery of a rich mineral deposit on the land. And the true character of the transaction at Sidney seems plain, from all of the circumstances, and from what the court had a right to find occurred there. Gowan was not there, nor did he pretend to be, to purchase the land, for that had already been done. Nor did either of the Crowleys so understand it. There were no negotiations as to price,—no price agreed upon. Nothing was said about payment of a purchase price, nor of the payment of money, except as we have stated. The $40 which Gowan handed to Crowley was in the nature of a

gratuity. Its payment was not exacted by the Crowleys, but was brought about by a remark which clearly indicated that the Crowleys knew that they had no valuable interest in the property to dispose of, made after the deed had been executed and delivered to Gowan as the representative of the grantee. It is obvious, from what was said and done, that Mr. and Mrs. Crowley well knew that Gowan had been sent to Sidney for the purpose of obtaining a deed to be executed by both of them, because Mrs. C. had not signed the one by which, in 1882, Mr. Crowley had conveyed the land; the deed executed by him alone being then submitted for their inspection, and for comparison by the notary, that they might be assured that the land described was the same.

To sum it all up, it is evident that, as Crowley's execution of the quitclaim deed, and the procuring of his wife to join in it, was nothing more than he was bound to do by his covenants in the 1882 deed, any misrepresentations or concealments by Gowan as to the condition or value of the land could not have amounted, in law, to a fraud upon Crowley himself, and that Gowan was under no obligation to communicate to Mrs. Crowley anything as to the condition or value of the land, and, further, that in no event did the evidence require a finding by the court that Gowan made any false representations to Mrs. Crowley. For these reasons, the plaintiffs were not entitled to have the deed set aside. Order affirmed.

CANTY, J. I concur, on the ground that Gowan's dealings were solely with Crowley, and his representations were made solely to Crowley; that he left Crowley himself to deal with Mrs. Crowley, who was a stranger as to the lumber company; and that it owed her no duty, and she owed it none, but what she did was, from the court's findings, done for her husband, and to relieve him from his covenants.

COLE et ux. v. KIMBALL.

(52 Vt. 639.)

Supreme Court of Vermont. Orange. March Term, 1880.

Covenant. The declaration counted on a covenant against incumbrances in a deed from the defendant to the plaintiff Florette. The case was referred, and the referee reported in substance as follows: On August 26, 1871, the defendant by warranty deed containing the usual covenants, including a covenant against incumbrances conveyed to the plaintiff Florette certain premises in Braintree that had been conveyed to him by Mansel Heselton and wife; and said Florette, in payment therefor conveyed to the defendant a farm which had before been conveyed to her by her father, Leonard Fish, and with her husband executed to him a promissory note for $462, which said Leonard afterwards paid. On June 11, 1872, the plaintiffs by like deed conveyed the premises to Lucia M. Fish, the mother of said Florette, and wife of said Leonard. The premises when conveyed by the defendant as aforesaid, were subject to a mortgage executed by Heselton and wife to Elihu Hyde in 1869, conditioned for the payment of two promissory notes for $250 each, payable in one and two years respectively, with interest, one of which only had been paid. In December, 1875, Hyde brought a petition for foreclosure against the Fishes and others, but not against the Heseltons nor the Coles, and in the following January obtained a decree for $313.29, the sum due in equity, and $28.55 costs, to be paid before January 1, 1877, with interest. On November 1, 1876, Hyde sold and assigned that decree to Ephraim Thayer for $350, Thayer acting therein for said Leonard and at his request; and afterwards, and before this action was brought, said Leonard, acting therein for his wife, paid *Thayer the amount of the decree in full, with interest. The conveyance from said Leonard to said Florette, and from her to said Lucia were without consideration, and they and the holding of title by said Florette were for the convenience, and at the request, of the Fishes, said Leonard doing all the business in connection therewith, and the plaintiffs having nothing to do with it, except to execute deeds, &c., as desired. This action was brought and prosecuted by said Lucia, in her own behalf and for her own benefit, and with the privity and consent of said Leonard. The referee found that if the plaintiffs were entitled to recover, they should recover $341.84, with interest from January 1, 1876. While the action was pending the Fishes, in consideration that final judgment should ultimately be rendered therein for the plaintiffs for the full amount of damages found by the referee, filed in court a release of the defendant from all causes of action that they or either of them had, or could have, in their own names to recover damages consequent on a breach of any of the covenants in his deed to said Florette. The court at the December Term, 1879, POWERS, J., presiding, rendered judgment on the report for the plaintiffs for nominal damages and costs; to which the plaintiffs excepted. *641

P. Perrin and *J. W. Rowell*, for the plaintiffs. *N. L. Boyden*, for the defendant.

ROYCE, J. It is conceded that the plaintiffs are entitled to nominal damages; and the only question made is, whether upon the facts found by the referee they are limited to the recovery of such damages, or are entitled to recover the amount paid to redeem the premises from the Hyde decree. This suit was brought and prosecuted by Lucia M. Fish, for her benefit, with the privity and consent of her husband, Leonard Fish, who acted for her in paying the money to redeem the premises from the Hyde decree. Florette D. Cole held the title to the premises conveyed to her by the defendant as the trustee of Leonard and Lucia M. Fish, and the covenants contained in the deed from the defendant to Florette D. are in equity to be treated as covenants for the benefit of the *cestuis que trust*. All the interest that Florette D. had in said covenants passed to Lucia M. Fish by the deed from the plaintiffs to her. The defendant is liable on the covenants in his deed to protect the title against the incumbrances that were upon the premises described in the deed at the time of its execution. The covenant against incumbrances runs with the land, and can be enforced for the benefit of the party holding the legal title. The payment of the amount due on the Hyde decree was not a voluntary payment, but a compulsory one. Fish was obliged to make it to save his title to the premises. The claim to indemnity on account of the breach of the covenants of title and against in*cumbrances was a chose in action, and was transferred to Lucia M. Fish by the deed from the plaintiffs to her; and the assignee of a chose in action has the right (subject to the right of the assignor to require indemnity against costs) to sue in the name of the assignor. It is a matter of indifference to the defendant to whom he pays, if he is fully protected against any further liability. It is not claimed that there is any other party but Leonard Fish and wife that could make any claim against the defendant on account of his covenants; and the discharge filed in the case is a full protection against any claim that they might otherwise make. The rule of law that limits the recovery in actions of covenant against incumbrances to the amount paid to remove the incumbrance was adopted for the protection of the covenantor, for until full payment the liability of the covenantor would continue. The cases relied upon by the defendant differ from this in the important fact that in none of those cases did it appear that the suit was being prosecuted for the benefit of an assignee who had been compelled to make payment to save his estate, and full indemnity had been tendered to the covenantor. The attempted defense is purely technical; and it does not appear that any defense which the defendant might have made if the suit had been in the name of Leonard Fish and wife was not equally available to *644

him in the present suit. In Smith v. Perry, Admr. 26 Vt. 279, the plaintiff had not paid the judgment recovered by his grantee on account of the breach of his covenant of title, but the court allowed a full recovery to be had, protecting the defendant's estate against further liability by the form of the judgment rendered. Here, as we have seen, the defendant is protected by the discharge filed.

Judgment reversed, and judgment for the largest sum.

PENDILL et al. v. MARQUETTE COUNTY AGRICULTURAL SOC.

(55 N. W. 384, 95 Mich. 491.)

Supreme Court of Michigan. May 31, 1893.

Error to circuit court, Marquette county; John W. Stone, Judge.

Ejectment by Frank P. Pendill, Joseph Neidhardt, and James E. Sherman against the Marquette County Agricultural Society. The court directed a verdict for defendant, and plaintiffs bring error. Reversed.

Hayden & Young, for appellants. Ball & Hanscom, for appellee.

HOOKER, C. J. Plaintiffs brought ejectment, claiming title in fee to the premises described in their declaration, and proved a perfect title from the federal government. The defenses made are (1) that plaintiffs are estopped from asserting their title against defendant; (2) that defendant has acquired title by adverse possession. The ancestor of plaintiff Pendill, one John Pendill, was the owner of a tax title covering the land in controversy, upon which an auditor general's deed had issued to him. After his death, plaintiff Pendill, and the other heirs and widow of the decedent, joined in a partition deed reading as follows, viz.: "This indenture, made," etc., "between Frank Pendill" (and the other heirs) "who are the sons and heirs at law of James Pendill, deceased, witnesseth, that the said parties, as such heirs at law and widow, have by amicable arrangement divided among themselves the property of said estate: Now, therefore, in order to carry into effect the said agreement and division, the said parties, in consideration of the sum of one dollar to each in hand paid, the receipt whereof is hereby confessed and acknowledged, have granted, sold, and conveyed all their right, title, and interest in and to the following described land," etc., (here follows description of land conveyed to the several parties,) "to have and to hold to each of said grantees the lands above described, as conveyed and set off to them in severalty, and to their heirs and assigns, forever." It is defendant's theory that under this partition deed, any title to the premises, subsequently acquired by Frank Pendill inured to the benefit of the grantee named in that deed, James Pendill, and through him to defendants. In the case of Jackson v. Waldron, 13 Wend. 178, it is said that "the principle of an estoppel, as applicable to deeds, is to 'prevent circuity of action, and to compel parties to perform their contracts.' Thus, a party asserting in a deed the existence of a particular fact, and thereby inducing another to contract with him, cannot by a denial of that fact compel the other party to seek redress against his bad faith by suit," etc.; and this doctrine is well supported. So, where the deed imports to convey a fee, though it lacks a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire. In the case of Van Rensselaer v. Kearney, 11 How. 326, it is said by Mr. Justice Nelson that "the principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance." We may then inquire whether the partition deed relied on carries on its face, by way of recital or averment, the statement that the grantors or their ancestor were seised of a title in fee in the premises, either in express terms or by necessary implication. After naming the parties, the deed recites the fact that they "have by amicable arrangement divided among themselves the property of the estate." The consideration is "one dollar to each," for which they "have granted, sold, and conveyed all their right, title, and interest" in the land mentioned. If there is an assertion of any particular interest or title, either express or by necessary implication, it is limited to that belonging to the estate, of which it may be presumed that all were equally cognizant. We see no opportunity for the application of the doctrine of estoppel to this case.

The question of adverse possession remains. Defendant purchased the premises from James Pendill, to whom this tax title was conveyed by the partition deed. Defendant claimed that it and its grantors had been in possession, claiming under this tax deed, for upwards of 10 years before this action was brought. The court instructed the jury that the evidence established such claim, and directed a verdict for defendant. The question, then, is, was the court justified in holding, as a matter of law, that the facts shown constituted adverse possession, instead of submitting the fact to the jury? In the case of Yelverton v. Steele, 40 Mich. 541, Mr. Justice Graves, in stating the law upon the subject of adverse possession said: "The doctrine which sanctions the divestiture of the true owner by hostile occupancy is to be taken strictly, and the case is not to be made out by inference, but by clear and cogent proof,"—supporting his opinion by numerous authorities. He quotes with approval the language of Mr. Justice Duncan where he says that "it must be an actual, continued, visible, notorious, distinct, and hostile possession." While it would have been the duty of the court to have directed a verdict for the plaintiffs in case of the absence of

clear and cogent proof upon any one of these six requisites, he could not properly have directed a verdict for the defendant, unless each and every one of them were established by such proof, uncontroverted; for, the moment that any evidence fairly tending to disprove one of them was given, a question of fact for the jury arose, whether it was shown by plaintiffs, or appeared from the examination of defendant's witnesses. The partition deed was executed August 3, 1885, at which time James Pendill succeeded to the tax title of his ancestor. He was called upon rebuttal, and testified as follows: "Question. You made your contract with Maynard in the summer of 1886,—July or June, 1886. What do you say with respect to your drawing rent, or there being anybody in occupation of the property, up to that time? Answer. I am certain it ceased before that time." On cross-examination the same witness was questioned, and answered as follows: "Q. The slaughterhouse he [meaning the ancestor] had there was occupied by him, was it not, up to the time of his death? A. Not all the time, sir. Q. I mean he had something there, he kept something there, and looked after it. A. I don't think—not at the time—he had anything there before it burned. Q. I mean up as long as he lived. Didn't he have some tools? A. I don't believe anything was ever kept there for some time. We had no use for it. Q. He still retained charge of it, and looked after the property, I suppose, did he not? A. In what way? Q. Well, looked after it to see there were no trespasses committed on it. A. I don't believe he had been there for some years. Q. Don't you think he was out there the season before he died? A. No, sir; I don't think he had any occasion to go there. Q. He had tenants living in the house? A. I don't think he did at that time. Q. Do you know about it? A. Well, I can't state positively just when they came and went, but I know the house was vacant a large part of the time." Again, the witness Prentice, who went in 1881 to look at the old house with a view to using it as a pesthouse, says that he found the house unoccupied, windows out, and the doors down, and the floor about used up. All this was evidence bearing on the question of whether there was actual or [illegible] or notorious or continued occupancy; and though the court may perhaps properly have felt that the great preponderance of evidence showed the possession claimed, in which opinion the jurors might have concurred, it was their province to deal with the question, which could not properly be taken from them. We see no alternative but to reverse the judgment, with costs.

Ordered accordingly.

GRANT, J., did not sit. The other justices concurred.

WITHY v. MUMFORD.

(5 Cow. 137.)

Supreme Court of New York. 1825.

On demurrer to the declaration. This was of a plea of breach of covenant, and stated that Feb. 21, 1814, the defendant, by indenture between him and one Harnden, did grant, &c., to Harnden in fee, certain lands (describing them); and that he did covenant, &c., with Harnden, his heirs and assigns, &c., to warrant and defend the premises, &c., against all persons claiming, &c.; that on the day of the execution of this indenture, Harnden entered into possession of the premises, &c.; and afterwards, March 12, 1817, by indenture between him and the plaintiff, conveyed the same premises to the plaintiff, in fee, who entered, &c.; but was afterwards evicted by certain persons having lawful title, before the defendant conveyed to Harnden. And so, &c.

The defendant craved oyer of the indenture between Harnden and the plaintiff, which was granted; and the indenture set forth, contained a covenant of warranty from Harnden to the plaintiff, his heirs and assigns. For this cause, demurrer and joinder.

J. A. Collier, in support of demurrer. S. Sherwood, contra.

SAVAGE, C. J. The point on which the defendant relies, is, that the deed from Harnden to the plaintiff containing a covenant of warranty, he cannot sue as assignee.

In the days of Lord Coke, the law was understood differently. He says: "If a man enfeoffeth A. to have and to hold to him, his heirs and assigns; A. enfeoffeth B. and his heirs; B. dieth, the heir of B. shall vouch as assignee to A.: so as heirs of assignees, and assignees of assigns, and assignees of heirs, are within this word (assigns); which seemed to be a question in Bracton's time. And the assignee shall not only vouch, but also have a warrantia cartæ." Co. Litt. 384b, and the authorities there cited.

The same doctrine is found in Spencer's Case, 5 Coke, 17, and in all the books. That the covenant to warrant and defend, is a covenant which runs with the land, and that the assignee is entitled to the benefit of all such covenants, is a proposition which needs not the citation of an authority for its support. The doctrine will be found, however, in 4 Cruise, Dig. 452–457.

The case of Middlemore v. Goodale, Cro. Car. 503, was an action by the assignee on the covenant for further assurance. The defendant pleaded a release from J. S. with whom he made the covenant, which release was executed after the commencement of the suit. All the court agreed, that the covenant ran with the land, and that the assignee should have the benefit of it.

From these authorities it is clear that the covenant of warranty runs with the land, and is intended for the benefit of the grantee, his heirs or his assigns, according to the language of the covenant itself.

But it is contended by the defendant, that though the assignee of the grantee may generally resort to the original grantor, for a breach of the covenant happening after the assignment; yet he has not such remedy, when he has a warranty from his immediate grantor. There is surely nothing in the covenant of warranty itself, to justify such a doctrine; nor is there any reason growing out of the acts of the parties, why the assignee, by taking a warranty from his immediate grantor, should lose his claim upon the first grantor. It cannot operate by way of release. If this were the consequence, a quitclaim deed would often be a better conveyance than one with full covenants.

It is contended, however, that this doctrine is supported by authority, and the cases of Greenby v. Wilcocks, 2 Johns. 1, and Kane v. Sanger, 14 Johns. 89, are cited.

The case of Greenby v. Wilcocks decides, that an action upon the covenant of seisin, cannot be brought by the assignee, because the grantor, having no title when the covenant is made, it is broken immediately, before the assignment, and when broken, becomes a mere chose in action, and, as such, is incapable of assignment. This being the only reason given, it would seem to follow, that whoever was owner of the land, which was the substratum of the covenant, would be entitled to prosecute for the breach of a covenant running with that land, if broken while the land was in his hands. This case, therefore, proves nothing against the plaintiff's right of recovery in the principal case, but rather supports it. The plaintiff, an assignee, has been evicted. The covenant remained unbroken, till after the assignment to him. He has been damnified, not the original grantee, Harnden; and if the defendant's doctrine be correct, Harnden may recover damages which he never sustained, and may pocket the money; while the plaintiff, upon whom the whole loss has fallen, can recover nothing, if Harnden be unable to respond. Such a doctrine I should hold utterly untenable, were it not for what was said by the late Chief Justice Spencer, in the case of Kane v. Sanger.

That was an action of covenant, brought to recover damages for an eviction of the plaintiff's grantees. The counsel for the plaintiff seems not to have argued the main point; but placed his right to recover upon a variance between the defendant's notice and proof. Spencer, J., in delivering the opinion of the court, says, "It is a general rule, that where covenants run with the land, if the land is assigned or conveyed, before the covenants are broken, and afterwards they are broken, the assignee or grantee can alone bring the action of covenant to recover damages; but if the grantor or assignor is bound to indemnify the assignee or grantee, against such breach of covenant, then the assignor or grantor must bring the action." And he cites 2 Mass. 460.

In a subsequent part of the opinion, he admits, that to avoid circuity of action, a release from the plaintiff's grantees to the defendant, would have been a bar to the suit, but for the circumstance, that they had given the plaintiff mortgages; and the mortgages reinvested the title in the plaintiff; so that, in effect, there were no assignees. The plaintiff having conveyed away the property, and received it back, stood as if no conveyance had ever been executed by him. These mortgages had been assigned to Morris; and it was a fact in the case, that the suit was brought by the direction, and for the benefit of Morris; so that the recovery, after all, was virtually in favor of the assignee.

The remark, therefore, that the assignee, with warranty, could not maintain an action, as assignee, for a breach after the assignment, was not called for. It professes to be supported by no authority, but the case of Bickford v. Paige, 2 Mass. 460, per Parsons, C. J. With the greatest deference, I do not understand such doctrine to be there asserted. The case itself was an action by the covenantee, against the covenantor; and breaches were assigned upon the covenants of warranty, of seisin, and against encumbrances. The defendant pleaded, that the plaintiff, before suit brought, had conveyed to one Roberts, without any covenants making him liable for any defect of title. The plaintiff, in his replication, set out his deed to Roberts, being a release with warranty against himself, his heirs and assigns. To this replication the defendant demurred. No encumbrances were shown, nor any eviction. The court, therefore, decided, that the plaintiff ought to recover on the covenant of seisin, on the ground that this covenant having been broken before the plaintiff's release to Roberts, it was a chose in action, unassignable in its nature; and, therefore, did not pass to Roberts by the release. Parsons, C. J., in the course of delivering the opinion of the court, advances the doctrine relied on by the late chief justice of this court, in these words: "It is a general rule, that when a feoffment or demise is made of land with covenants that run with the land, if the feoffee or lessee assign the land, before the covenants are broken, and afterwards they are broken, the assignee, only, can bring an action of covenant, to recover damages, unless the nature of the assignment be such, that the assignor is holden to indemnify the assignee against a breach of the covenants by the feoffor or lessor. This rule is founded on the principle, that no man can maintain an action to recover damages, who can have suffered no damages."

Here, it is distinctly asserted, that the grantee, who is also the assignor, can maintain no action for damages, if he is himself not liable to his assignee. Why? Because he can have suffered no damages. The assignee, who has suffered damages, and he only, can bring the action in such a case. But, if the assignor has covenanted to warrant the assignee, and has actually sustained damage, in consequence of his covenant, by a recovery against him, then he has his remedy over against his grantor. Having been damnified, he is thereby reinvested with his original rights. Then he will have suffered the damages, which he seeks to recover on the covenant to himself; and, in such a case, the assignee is not the only person, who, under any circumstances, may prosecute the original grantor. That this is what Chief Justice Parsons meant, is evident from what he lays down as the foundation of the rule. The reason he gives is, that no man can recover damages, who has sustained none. Mere liability is not enough. Actual damage must have been suffered by the assignor, to authorize the action by him. To place any other construction upon the language of Chief Justice Parsons, is to render him inconsistent with himself; besides making him stem the whole current of authority.

This subject has been very fully discussed in Booth v. Starr, 1 Conn. 244. The facts were, that J. Booth conveyed with warranty, to S. Booth, a lot of land in Hudson. Booth conveyed to a third person, he to a fourth, and he to the fifth grantee—all with covenants of warranty and seisin. The last grantee was evicted; but the plaintiff, S. Booth, was not damnified. Swift, J., states the question to be, whether, in the case of a covenant of warranty, annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor, without having been sued by, or satisfied the damages to the last covenantee, who has been evicted.

The question was discussed with great learning and ability, and at considerable length; and the court expressly decided, that the last covenantee, who has been evicted, may prosecute any, or all of the preceding covenantors, till he obtain satisfaction; but that no intermediate covenantee can sue his covenantor, till he himself has been compelled to pay damages upon his own covenant.

In this case, the plaintiff might have sued Harnden, his own immediate grantor. He did not choose to do so. Harnden may have been dead, or insolvent, or the plaintiff may have had other reasons for preferring a direct resort to the defendant. It is sufficient for his purpose, that he had a legal right to do this.

In the case of Garlock v. Closs (decided by this court, in May term, 1824) 5 Cow. 143, note, a similar action was sustained by an intermediate covenantee, who had been damnified, though the property had passed through four different grantors, with warranty, down to himself. The plaintiff is entitled to judgment. Judgment for the plaintiff.

WELBON v. WELBON et al.
(67 N. W. 338.)

Supreme Court of Michigan. May 19, 1896.

Appeal from circuit court, Washtenaw county, in chancery; Edward D. Kirne, Judge.

Bill by Isaac Welbon against Mary Jane Welbon and others to foreclose a mortgage. There was a decree for complainant and defendants appeal. Reversed.

The object of this suit is to foreclose a mortgage executed by the complainant to one Joseph M. Thompson. The material facts are these: Complainant was the husband of defendant Mary Jane, and the father of the other defendants. Mr. and Mrs. Welbon became involved in trouble, resulting in her filing a bill of divorce against him. This trouble was then finally arranged, and resulted in complainant's executing a deed of this land to his children, who were then minors. The land was a farm, and the family moved and lived upon it for a while. Previous to the execution of this deed, complainant had executed this mortgage for the sum of $200. His wife did not join in the mortgage. It is claimed that the family did not know of the mortgage until some years afterwards. Mr. and Mrs. Welbon again became estranged. She left him, and, with the children, went to Detroit. She again filed a bill of divorce against him, and obtained a decree. In 1885 complainant paid Mr. Thompson the amount of the mortgage debt, and the mortgage was returned to him. Shortly after, Mr. Welbon presented a paper for Mr. Thompson's signature, saying that he wanted something to show that the mortgage was paid. Mr. Thompson executed the paper, which was an assignment instead of a discharge. Decree for the full amount and interest was entered.

John H. Powell, for appellants. John P. Kirk, for appellee.

GRANT, J. (after stating the facts). The decree, we think, cannot be sustained for several reasons:

1. The defendants were not personally liable for the debt secured by the mortgage. It was therefore erroneous to enter a decree against them for any deficiency. Complainant alone was personally liable for the debt, and had paid it.

2. In the deed to his children complainant reserved a life estate in himself. It was his legal obligation to pay the interest upon the mortgage during the existence of the life estate. The decree was erroneous in including interest.

3. The deed contains the following covenant: "The said party of the first part, for himself, his heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said parties of the second part, their heirs and assigns, that at the time of the ensealing and delivering of these presents he is well seised of the above-granted premises in fee simple; that they are free from all incumbrances whatsoever, except a certain mortgage given by him to Joseph M. Thompson, dated October 18, 1883; and that he will, and that his heirs, executors, and administrators shall, warrant and defend the same against all lawful claims whatsoever." The covenant of warranty contains no exception, and the previous mention of the existence of this incumbrance does not take it out of his covenant of warranty to defend the title against all lawful claims whatsoever. In other words, there is no limitation placed upon this covenant. Manufacturing Co. v. Zellmer (Minn.) 51 N. W. 379. The decree must be reversed, with costs of both courts, and the bill dismissed.

LONG, C. J., did not sit. The other justices concurred.

BLAKESLEE v. SINCEPAUGH.

(24 N. Y. Supp. 947, 71 Hun, 412.)

Supreme Court, General Term, Fourth Department. Sept., 1893.

Appeal from circuit court, Tompkins county.

Ejectment by H. D. Blakeslee against Isaiah Sincepaugh. From a judgment rendered on a verdict for defendant, and from an order denying a motion for a new trial upon a case and exceptions, plaintiff appeals. Affirmed.

The action is in ejectment for 19.41 acres of land. In the complaint it is alleged that on December 3, 1880, Havilla D. Blakeslee, then being the owner of these and other lands, conveyed the same to the plaintiff; that plaintiff thereupon entered into possession, and so remained until on or about December 1, 1882, when the defendant entered into possession, and ousted the plaintiff; and that defendant has ever since been in possession. In the answer it is, among other things, alleged that the defendant, on the 1st December, 1882, purchased the premises of Havilla D. Blakeslee; that shortly before this the plaintiff, knowing that defendant was about to purchase from Havilla D. Blakeslee, falsely and fraudulently represented to the defendant that he (the plaintiff) had no title or interest in the premises, and that they were owned by Havilla D. Blakeslee, and that defendant, relying on such representations, and by reason thereof, took a conveyance from Havilla D., paying him therefor the sum of $680; that defendant thereupon went into possession, and has made extensive improvements on the property. The answer also alleges that defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff became the owner or received a conveyance on or about December 3, 1880, or entered into possession.

Argued before HARDIN, P. J., and MERWIN and PARKER, JJ.

M. N. Tompkins, for appellant. David M. Dean, for respondent.

MERWIN, J. Upon the trial of this action, it was shown on the part of the plaintiff that Havilla D. Blakeslee, by deeds dated September 25, 1834, and September 22, 1838, became the owner of a quantity of land, and thereafter, by deed dated December 3, 1880, and duly recorded December 4, 1880, he, with his wife, conveyed the same to the plaintiff, excepting 16 acres theretofore conveyed to the plaintiff. The premises in dispute are a part of the lands described in these deeds. The consideration of the deed of December 3, 1880, as stated in the deed, is the sum of one dollar, and the maintenance and support of the parties of the first part during their natural lives. It was then shown on the part of the defendant that Havilla D. Blakeslee and wife by warranty deed dated December 1, 1882, and recorded December 5, 1882, conveyed the premises in dispute to the defendant for the consideration therein named of $680, which defendant at the time paid to the grantor, or the person acting for him. Havilla D. Blakeslee was the grandfather of plaintiff, and evidence was given tending to show that plaintiff at this time lived with his grandparents on the farm of which the premises in question were a part; that he knew of the negotiations for the purchase by defendant of the grandfather; that during these negotiations the defendant saw the plaintiff, told him he was talking about buying a piece of land of his grandfather, and had heard that he (the plaintiff) had an interest in it, and asked him whether that was so, and whether he had any deed or mortgage against it, and he (the plaintiff) replied that he had no deed or mortgage against it, and had no interest in his grandfather's premises; that the plaintiff at the time knew that he was the legal owner of the property, and made the statement to defendant with intent to deceive him, and induce him to buy of the grandfather; that the defendant thereupon, in reliance upon the truth of plaintiff's statement, and in ignorance of the true state of the title, made the purchase of the grandfather. The plaintiff denied making the representations or that he knew that his deed covered the property conveyed to defendant. It was also shown that plaintiff was then a minor, having been born March 6, 1862. At the close of the evidence the counsel for plaintiff asked the court to direct a verdict for the plaintiff upon several grounds,—chiefly, that the evidence upon the part of the defendant was not sufficient to constitute an estoppel; that at the time of the alleged statements the plaintiff was an infant, and that if he made the statements he did not know at the time whether or not he owned the land, and that no fraud was shown upon his part; and that the defendant was guilty of negligence, in not causing the records to be searched. The court denied the motion, and stated that in its opinion the better way to dispose of the case was to submit it to the jury on four questions: "First, whether these statements were made by the plaintiff to the defendant. Second, whether the plaintiff had knowlede at the time he made them that he was the legal owner of this land. Third, whether they were made by the plaintiff with the intention that they should be acted upon by the defendant in the purchase of the land. Fourth, whether they were acted upon and relied upon by the defendant when the land was purchased by him."

The plaintiff's counsel duly excepted to such ruling, and to the denial of the motion. The case was thereupon submitted to the jury upon the line suggested by the court, and a general verdict rendered for the defendant. There was no exception to the charge, and no request that any other question should be submitted to the jury.

1. The first proposition now presented by the plaintiff is that the plaintiff, being an infant at the time of making the alleged statements, was not estopped thereby. Assuming, as we must, that the facts, so far as warranted by the evidence, were found against the plaintiff, we have here a case of intentional fraud. In Spencer v. Carr, 45 N. Y. 406, where, as here, it

was claimed that an infant was barred of her title by an equitable estoppel, it was held that in the absence of intentional fraud upon her part she would not be estopped, and that as that was not found she would not be deprived of her legal rights. The inference is that if there was intentional fraud the doctrine of equitable estoppel would apply, notwithstanding infancy. The opinion of the court in the case strongly supports this inference in cases where the infants are of sufficient age to appreciate their rights and duties. We are referred to no case in this state where the views suggested in Spencer v. Carr are criticised. In Brumfield v. Boutall, 24 Hun, 457, the question of fraud on the part of the infant was not up, nor was it in Sherman v. Wright, 49 N. Y. 231. The same may be said as to Ackley v. Dygert, 33 Barb. 176. In Brown v. McCune, 5 Sandf. 224 (decided in 1851), it was held that fraudulent representations as to his age did not bind an infant. This case was criticised, and the opposite rule held, in Eckstein v. Frank, 1 Daly, 334. In Green v. Green, 69 N. Y. 553, a father had taken a deed from his minor son, and paid him the consideration, and the question was whether the son, on becoming of age, could repudiate the deed without restoring the consideration. It was held that he could, it appearing that the money was spent, and he had no other property with which to replace it. There was no question of fraud in the case. In 1 Story, Eq. Jur. § 385, it is said, in reference to cases like the present, that: "Cases of this sort are viewed with so much disfavor by courts of equity that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation, for neither infants nor femes covert are privileged to practice deception or cheats on other innocent persons." In 2 Sugd. Vend. (8th Am. Ed.) p. 507, c. 23, § 1, pl. 17, it is said: "If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age." In 2 Pom. Eq. Jur. § 815, it is said: "An equitable estoppel arising from his [the infant's] conduct may be interposed, with the same effect as though he were an adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct, upon which the other party has relied and been induced to act." Numerous cases are cited to each of the quoted propositions. The same rule is stated in Bigelow, Estop. p. 448. See, also, note in 44 Am. Dec. 386 (Knifong v. Hendricks); Bisp. Eq. § 293. There is no doubt, in the present case, that the infant was of sufficient age to appreciate his rights and duties. He lacked only a few months of being of age. The rule to be inferred from the Spencer Case, as to the application of the doctrine of equitable estoppel to infants, while it may not be entirely consistent with the supposed disability and need of protection of infants, has, I think, the weight of authority in its favor, and it should be followed by us in this case. The court below therefore properly held that the fact that plaintiff was an infant did not, of itself, relieve him.

2. The plaintiff further claims that he should not be estopped because he had no knowledge that he owned the land in dispute. This, however, upon the evidence, was a question of fact, and was found adversely to plaintiff.

3. It is further claimed that the burden of proof is on the defendant, and that, the testimony being evenly balanced, defendant must fail. It is true that the burden of proof was on the defendant, and that statements testified to by the defendant were denied by the plaintiff. It was, however, for the jury to determine where the truth was, and there were many surrounding circumstances that bore upon the question.

4. It is further claimed that the defendant was guilty of laches, in neglecting to consult the records in the clerk's office; and the case of Banking Co. v. Duncan, 86 N. Y. 221, is cited in support of the proposition. In that case the plaintiff, who sought the benefit of an estoppel, neither looked at the record nor made any inquiry of anybody as to the ownership of the property, and it was held that its failure to examine the record and make inquiry prevented its recovery. The present case is materially different. So, in McCullouch v. Wellington, 21 Hun, 5, there were no representations by the owner, but, as said in the opinion at page 14, it was the case of a purchaser, who, from his confidence in the vendor, or from other circumstances not imputable to the claimant, has purchased property, and omitted to make the necessary and ordinary examination of title. In Lyon v. Morgan (Sup.) 19 N. Y. Supp. 201, the effect of failure to examine the record was not determined, and the case was decided upon other grounds. If the present case was one where the owner was simply silent, it may be that the constructive notice from the record would prevent the defendant from receiving any benefit from the doctrine of estoppel. But, assuming there were false representations and intentional fraud, the rule would be different. Brinckerhoff v. Lansing, 4 Johns. Ch. 65; Fisher v. Mossman, 11 Ohio St. 47. As said by Judge Strong in Hill v. Epley, 31 Pa. St. 334, "it should never be forgotten that there is a wide difference between silence and encouragement." A party setting up an equitable estoppel is himself bound to the exercise of good faith, and due diligence to ascertain the truth. 2 Story, Eq. Jur. (12th Ed.) § 1553b. Whether the defendant, in that respect, was negligent, under the circumstances of the present case, was a question of fact. Moore v. Bowman, 47 N. H. 494. The court below was therefore correct in holding that it should not be said, as matter of law, that the defendant was guilty of negligence.

5. The appellant claims that incompetent testimony was admitted, to his prejudice, but we find no ruling that supports this contention.

No other question is presented. It follows that the judgment should be affirmed.

Judgment and order affirmed, with costs. All concur.

GRAY v. CROCKETT et al.

(10 Pac. 452, 35 Kan. 66.)

Supreme Court of Kansas. April 9, 1886.

Error from Douglas county.

Action brought March 3, 1882, by B. Gray against Elizabeth I. Crockett, H. C. Long, and Martha M. Long, his wife, to compel them to convey to plaintiff certain real estate. The defendants filed the following answer, omitting court and title:

"First. They admit that said Elizabeth I. Crockett purchased the real estate described in said petition, but without any notice of the pretended contract set out in said petition, as alleged to be existing between said plaintiff and said defendant H. C. Long; and these defendants, further answering, say:

"Second. The said pretended contract set out in said petition is absolutely void, and of no legal effect, and that said plaintiff should not be allowed to have and maintain his action thereon, because they say that the said land described in said pretended contract was one entire body of land less than one hundred and sixty acres in amount, situated in Wyandotte county, state of Kansas, and not within the limits of an incorporated town or city, and was at the time of the signing of said pretended contract by said defendant H. C. Long occupied as a residence by the family of said H. C. Long and the defendant Martha M. Long, his wife; and these defendants aver that said Martha M. Long never did sign said pretended contract, and never in any manner assented thereto.

"Third. They deny each and every other allegation and averment contained in said petition."

The first trial was had at the July term of court for 1882. The court then decided the contract of April 22, 1881, void and of no effect, and rendered judgment for the defendants. The plaintiff brought the case here, and the judgment of the district court was reversed, and the cause remanded for a new trial. Gray v. Crockett, 30 Kan. 138, 1 Pac. 50. At the July term, 1883, of the court, Gray obtained judgment against the defendants, who brought the case here. That judgment was reversed, and the cause remanded for a new trial. Crockett v. Gray, 31 Kan. 346, 2 Pac. 809. On April 7, 1884, the defendants filed a motion for a change of venue, on account of the alleged bias and prejudice of the district judge, Hon. W. R. Wagstaff. This motion was overruled. The defendants then filed another motion for a change of venue, for the reason that the district judge, Hon. W. R. Wagstaff, was a material witness for the defendants upon the trial of the cause, and that the defendants desire to have his testimony. On May 2, 1884, this motion was sustained, and the cause sent to the district court of Douglas county for trial. Trial had at the April term of the district court of that county for 1884, and in the month of July of that year, a jury being waived. The court made the following conclusions of fact:

"(1) That at the time and place mentioned in plaintiff's petition plaintiff made with defendant H. C. Long the contract in said petition stated and set forth; that the lands in said petition described are the lands mentioned in said agreement, which was reduced to writing and signed by the parties thereto; (2) that H. C. Long was a married man, and with his wife lived upon said tract of land, which was situated within the city of Wyandotte, and one acre thereof constituted the homestead of H. C. Long and wife; (3) that at the time of the making of the aforesaid written agreement said Long's said wife was present, and heard the contract stated, and knew the terms and conditions thereof, and did not dissent therefrom, excepting that she expressed a desire that the deferred payments shall draw ten per cent. interest, instead of eight per cent., as provided in said writing; (4) that she did not sign, and was not asked to sign, said contract, or to become a party thereto; (5) that no money was paid the said Long upon said contract, but at the time, or before the time, provided by said contract for the payment of money thereon the plaintiff offered to pay the first payment of money required to be paid thereon, which payment was refused by said Long, who declined to fulfill the same; (6) that said Long and wife, after the making of said contract, sold the said lands, so agreed by said H. C. Long to be sold to said plaintiff, to defendant Elizabeth I. Crockett, who, before purchasing the same, had notice of the prior sale thereof by H. C. Long to plaintiff, excepting that said Long did not sell to said Crockett one acre and seven-tenths thereof; (7) that the price paid for the portion of said lands purchased by said Crockett was $8,500; (8) that in the year 1860, and on the thirteenth day of September of said year, said Long made a conveyance of the lands mentioned in the said contract of sale by H. C. Long to plaintiff to one R. L. Vedder, who received said conveyance from said Long, and took and delivered the same to the register of deeds of Wyandotte county for record, but did not pay the fee for recording the same; that said register of deeds received the said conveyance, and deposited the same, with other deeds, within his office, where the same remained until the same was found by the register of deeds of said Wyandotte county in the fall of the year 1883; (8½) that said deed was unrecorded by said register, and would have been found only by a person having such knowledge of the business management of said office as to induce an investigation of the package containing the same, being with other old and unrecorded deeds in said office; (9) that on the fourth day of December, 1860, said Richard L. Vedder conveyed said lands by deed, with warranty, to Martha M. Long, the wife of said H. C. Long, which conveyance was duly recorded in the office of the register of deeds of Wyandotte county on the ——— day of ———, 1869; (10) that the plaintiff had no actual

knowledge of either of said deeds from Long to Vedder, and from Vedder to Mrs. Long, until July, 1883."

And thereon the court made the following conclusions of law:

"(1) That at the time of the making of the contract of sale set out in the plaintiff's petition, Martha M. Long was the owner in fee-simple of the real estate in said contract mentioned and described; (2) that she is not estopped from asserting her ownership of or title to the same, and every part thereof, by reason of any act of hers suffered or done at the time or before or since the making of the contract between the plaintiff and H. C. Long set up by the plaintiff in this action; (3) that plaintiff in this action is not entitled to a specific performance of said contract; (4) that defendants are entitled to judgment in this action for costs, and it is so ordered."

The plaintiff excepted to all the findings of fact, and also to the conclusions of law. Judgment was entered in favor of the defendants for costs. Plaintiff excepted, and brings the case here.

N. Cree, J. W. Green, and B. Gray, for plaintiff in error. Stevens & Stevens and J. B. Scroggs, for defendants in error.

HORTON, C. J. It is claimed by the plaintiff that the order directing the trial of this cause to be had in Douglas, instead of Wyandotte, county, is void, and, if not void, is at least erroneous. The order was based upon the affidavit of H. C. Long, one of the defendants, setting forth "that he was advised by his attorney that Hon. W. R. Wagstaff, the district judge, was a material witness for the defendants upon the trial; that he believed the advice to be true; and that he desired the testimony of the judge at the trial, and intended to procure the same if a change of venue was granted."

Section 56 of the Civil Code reads:

"In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested, or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some county where such objection does not exist."

The contention is that a district judge is not "disqualified to sit," even if a material witness in a case, and that the affidavit upon which the order changing the place of trial to Douglas county was made was insufficient, in that it did not set out what the defendants expected to show by the judge, nor was it otherwise made to clearly appear that the judge was a material witness.

We do not think the order of the court void. A judge is not competent as a witness in a cause tried before him, for this, among other reasons: that he can hardly be deemed capable of impartially deciding upon the admissibility of his own testimony, or of weighing it against that of another. It is now well settled that the same person cannot be both witness and judge in a cause. 1 Greenl. Ev. (12th Ed.) § 364; Ross v. Buhler, 2 Mart. (N. S.) 312; 2 Bouv. Law Dict. 12. Therefore we think that where a judge is a material and necessary witness in a case, he is "disqualified to sit." If the district court had overruled the application to change the place of trial upon the affidavit presented, we would unhesitatingly pronounce the ruling eminently correct, because it seems to us that the true rule in such a case is that such facts and circumstances must be proved by affidavits, or other extrinsic evidence, as clearly show that the judge is a material and necessary witness, and unless this clearly appears a reviewing court will sustain an overruling of the application. City of Emporia v. Volmer, 12 Kan. 622. The affidavit in this case for the change of venue should have disclosed how the attorneys obtained knowledge of the fact that the district judge was a material witness, and all the facts the defendants believed the judge would prove. This was not done; but, although the affidavit is deficient in this respect, we cannot wholly ignore the personal knowledge of the judge who transferred the case. A judge ought not to transfer a case upon a mere suggestion, or even upon an affidavit stating conclusions only, and no change of venue should be granted except for cause, true in fact and sufficient in law, and all of this should be made to clearly appear to the court; but when an affidavit is presented in general terms for such a change, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is disqualified, cannot be declared erroneous. City of Emporia v. Volmer, supra; Edwards v. Russell, 21 Wend. 68; Moses v. Julian, 45 N. H. 52.

The contract set forth in the petition is as follows:

"April 22, 1881.

"Agreement between H. C. Long and B. Gray for sale of his farm of thirty-three acres, south side of Tauraume street, Wyandotte, for eight thousand dollars. Said Long agrees to sell the said farm for $8,000, payable as follows: $500 by the twenty-eighth of April inst.; $1,500 in three months from date; and balance, $6,000, in three years,—with interest at 8 per cent. Gray agrees to make payments as above, and pay Armstrong's commission, not exceeding $100. Gray to have possession when $2,000 is paid, and deed then to be given, and mortgage then given to Long for three years, at eight per cent. interest, with the privilege of paying the whole or part sooner.

"H. C. Long.
"B. Gray."

The principal and the important question involving the merits of this case arises upon the following finding of fact:

"At the time of the making of the written agreement Martha M. Long, wife of H. C.

Long, was present, heard the contract stated, knew the terms and conditions thereof, and did not dissent therefrom, excepting she expressed a desire that the deferred payments should draw ten per cent. interest instead of eight per cent., as provided in the contract."

A further finding of the trial court is to the effect that Mrs. Long was the owner in fee-simple of the real estate in controversy; and, as a conclusion of law, upon all the facts found, the court decided that Mrs. Long was not estopped from asserting her ownership or title to the same by reason of any act of hers suffered or done before, at the time, or since the making of the written contract of April 22d. At the time of the execution of this contract Long and wife lived upon the land within the city of Wyandotte, and the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, under which Mrs. Long claims title, was unrecorded. It had been delivered to the register of deeds of Wyandotte county for record in the year 1860, but was placed with other deeds in a package, where it remained until found by the register in the fall of 1883. It could only have been found by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing the same. The written contract shows upon its face that H. C. Long sold the land as his own. It is indisputable that the plaintiff supposed he was dealing with Long as the owner of the land; and that both husband and wife were willing to sell is evident from the fact that they did shortly thereafter sell at an advance. Mrs. Long asserted no title to the premises until after the decision of this court, in June, 1883, that the land was within the limits of the city of Wyandotte, and therefore that only one acre thereof was exempt as a homestead. Gray v. Crockett, 30 Kan. 138, 1 Pac. 50. This was more than two years after the execution of the written contract. Upon the belief that Long was the owner of the land, the plaintiff commenced his suit for a specific performance of his contract on March 3, 1882. This suit was prosecuted by him for over a year without Mrs. Long making her title known, and the money and time of the plaintiff was expended in his attempt to obtain the conveyance which H. C. Long had agreed to execute. When the case was tried at the July term of the court for 1882, it was admitted by all the parties, for the purposes of the trial, that on April 22, 1881, H. C. Long was the owner of the land described in the contract.

Upon the findings of fact, we think Mrs. Long is estopped, in equity, from now asserting that at the time of the contract between the plaintiff and her husband she was the owner of the premises described therein. Questions relative to estoppel are not, in general, controlled by technical rules, but are usually determined upon principles of equity and good conscience. Mrs. Long stood by and allowed the contract to be executed; to some extent she participated in the negotiations preliminary to the execution of the contract. Her silence as to her title, her acquiescence at the time of the contract, and her failure to disclose her title during the earlier stages of this litigation, invoke against her the familiar rule of justice, that if one stands by and allows another to purchase his property without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterwards try to assert his title. "He who will not speak when he should, will not be allowed to speak when he would." Goodin v. Canal Co., 18 Ohio St. 169; Tilton v. Nelson, 27 Barb. 595; Foster v. Bigelow, 24 Iowa, 379; Anderson v. Armstead, 69 Ill. 452; Thompson v. Sanborn, 11 N. H. 201; Ford v. Loomis, 33 Mich. 121; Beatty v. Sweeney, 26 Mich. 217; Dougrey v. Topping, 4 Paige, 93.

Judge Thompson, in an article concerning estoppels against married women, says:

"If a married woman owns real property, but her title is not of record, and her husband enters into a contract for the sale of it, of which she is informed at the time, and to which she makes no objection, she will be estopped from setting up her title to the land to defeat a suit brought against her husband for specific performance of his contract, and so would her grantee." 8 South. Law Rev. (N. S.) 275–310; Smith v. Armstrong, 24 Wis. 446; Catherwood v. Watson, 65 Ind. 576.

We are of the opinion, therefore, that the conclusion of law of the trial judge that Mrs. Long was not estopped from asserting her ownership or title to all the premises in dispute is erroneous, and cannot be sustained.

It is again insisted that defendants are entitled to judgment, even though the homestead included only one acre, as the contract was for the entire tract at a price in gross, and not so much per acre; and as the homestead acre was inalienable by the husband alone, and was in no manner identified in the contract or its price determined, that there is no way of apportioning the price of the 32 acres which the husband could sell. In addition to what is stated upon this point in the former opinion of this court in Crockett v. Gray, 31 Kan. 346, 2 Pac. 809, it appears to us from the record that H. C. Long and wife have no real complaint to make. Upon the trial the plaintiff offered these defendants the privilege of selecting their own homestead; therefore they will have the right to retain any acre of the land described in the contract which they may choose. The plaintiff only asks that his contract be enforced after these defendants select and retain one acre thereof. As was said by Mr. Justice Brewer, speaking for this court when the case was last presented to us for

our determination, "It is equitable that the contract of April 22, 1881, be enforced so far as is possible, and not that the contracting party be permitted to avoid his contract obligations." When Mrs. Crockett purchased she had notice of the prior sale of the premises to plaintiff, and therefore acted with full knowledge of all his rights. Meixell v. Kirkpatrick, 33 Kan. 282, 6 Pac. 241. L. H. Wood was the agent for Mrs. Crockett, and when she purchased, on December 24, 1881, she had no actual knowledge of the deed from Long to Vedder of September 30, 1860. This deed was found by Wood in a package in the register's office about September 10, 1883; therefore Mrs. Crockett bought the land with ignorance of the title of Mrs. Long, and, like the plaintiff, supposed she was dealing with Long as the owner. After the first trial of this case Mrs. Crockett became afraid of her title, and desired to sell the land. L. H. Wood then negotiated a sale of it from her to his father-in-law, the latter paying the same price that Mrs. Crockett did, with interest on her money. As all of these sales were made through L. H. Wood, and as he acted as agent both for Mrs. Crockett and his father-in-law, and had notice of all the rights of plaintiff, the latter parties are charged with his knowledge. Wood, and the principals for whom he acted, dealt with the land as that of Long, upon the belief that the contract of April 22, 1881, could be avoided solely because the land described therein was outside of the limits of the city of Wyandotte, and therefore, being the homestead of H. C. Long and wife, could not be alienated without their joint consent. The attempt to set aside the contract of April 22, 1881, upon the ground that Mrs. Long was then the owner of the premises, is an afterthought, evidently not contemplated when the joint answer of the defendants was filed.

The statute provides that in cases decided by this court when the facts are found by the court below, this court will send a mandate to the court below directing it to render such judgment in the premises as it should have rendered upon the facts found. Under the statute, therefore, in view of the conclusion obtained, as none of the findings are excepted to by the defendants, the cause must be remanded, with directions to enter judgment for the plaintiff. Code, § 559. Of course the plaintiff is only entitled to the enforcement of the contract of H. C. Long. He did not bargain for or purchase the supposed inchoate interest of Mrs. Long. She did not sign the contract, and was not asked to sign the same. The plaintiff is entitled to what his written contract calls for. The decree, however, for the specific performance of the contract, as well on the part of H. C. Long as of Mrs. Crockett, must be so framed as to fully protect such inchoate interest of Mrs. Long, as the wife of H. C. Long, whether owned by herself, or, subsequent to the contract, transferred to her codefendant Mrs. Crockett. The rights of the plaintiff are the same as though the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, had never been executed, and as though there had been no conveyance subsequent to the contract from H. C. Long to Elizabeth I. Crockett.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the justices concurring.

SUMNER v. SEATON.

(19 Atl. 884, 47 N. J. Eq. 103.)

Court of Chancery of New Jersey. May 22, 1890.

Bill for injunction. On final hearing on pleadings and proofs.

George Putnam Smith and F. G. Burnham, for complainant. Frank Bergen, for defendant.

PITNEY, V. C. Complainant rested her right to relief on three grounds: First, that the effect of the proceedings to change the location of the street was to vest in her the absolute legal title to the strip in question; second, that if the effect was not to change the title at law it did in equity; and, third, that the defendant is estopped by his silence and acquiescence, while complainant was making her improvements, from setting up his title as against her.

As to the first point. Should the complainant satisfy the court that it is well taken, the result would be simply to oust the jurisdiction of the court, for the simple reason that the ground is available at law as a defense to an action of ejectment. The proceeding here is and must be on the basis that the legal title is in the defendant; and as there has been a general verdict rendered by a judge without a jury, in favor of the defendant herein, and judgment entered thereon, it must have been upon a finding that the legal title is in him.

The second point presents a more serious question. Mrs. Smith owned a lot with 500 feet of frontage on a street in the city of Elizabeth. As so situated, it was admitted that it had great value. The city council changed the location of the street in front of it in such a manner as to cut off access from this lot to the street by interposing in front of it land belonging to a third party. That such a change must result in a serious injury to the value of the lot is obvious; yet not only were no damages awarded to Mrs. Smith, but a commission actually assessed a large sum against her for benefits conferred upon her lot, and when the feature in question was called to the attention of the municipal authorities they refused to abate it. Complainant urges, and I think rightly, that the action of the commission and the common council can be accounted for, consistently with the least intention on their part to act fairly and justly towards Mrs. Smith, only on the ground that they supposed that the effect of the proceeding was to vest in her the beneficial use of the intervening strip. It is impossible to suppose that five gentlemen, chosen on account of their intelligence, good judgment, and honesty, would make such an award on any other basis, or that an impartial city council would confirm it. These officials cannot be supposed to have been ignorant of the true situation of the property lines, for not only was their attention called to it by the written protest of Mr. Smith, but the map shows it most clearly. For these reasons I think it must be assumed that the whole proceedings, as well the ascertainment of damages as the assessment on account of benefits, must have proceeded on the basis or assumption that the strip in question would become the property of Mrs. Smith. The effect of this assumption is obvious. The sum total or aggregate of the cost of the improvement was reduced by the amount which the city would have been obliged to pay, if anything, to Mrs. Smith for damages to her lot caused by cutting it off from the street; and the amount to be assessed against the other lots, not situated in this respect the same as hers, was reduced by the amount actually assessed against her lot, and paid by her. Presumably, then, every other person liable to assessment derived a direct pecuniary benefit from the assumption in question; and there is, to my mind, great force in the argument that all the land-owners who participated in the fruits of this assumption became parties, so to speak, to the arrangement, and are estopped from setting up the contrary of the assumption upon which it was based, and from which they received a direct benefit.

But the defendant was not mentioned in the assessment on account of benefits, and it was not proved that he had anything to do with it, or that he made any individual arrangement with the common council on the assumption before mentioned. It is not shown that he knew anything of it, or of the commissioners' last assessment. And I do not at this moment perceive how the court can presume anything against him in this respect. But counsel for the complainant relies in this connection upon the release executed by the defendant, as above set forth. He argues that it must be read and construed in the light of the actual facts and features of the scheme of improvement, one of which, by the maps and assessments, appeared to be that whatever land the north-side owners might own south of the south line of the new street should go to the owners on that side, and that such feature clearly appeared by the inspection of the map on file in the proper department of the municipal government; and he argues that the land so, in effect, attempted to be transferred from the defendant to the complainant's grantor, is fairly included in and covered by the language of the release, as "land and real estate taken and appropriated by the city for the straightening of Railway avenue." In this connection it is important to observe that the payment was made to defendant, and the release in question executed by him in July, 1875, long after the strip in question had been fenced in and inclosed by complainant's grantor, and her improvements in part made, so that defendant, when he executed the release and accepted the money, must have known by observation just what the effect of the improvement was, and that the complainant supposed that she owned this land,

and was acting on that supposition. The power of a municipal corporation, in the absence of objection, to acquire land and transfer it to a natural person as a part of a scheme of legitimate improvement, is sustained by judicial decision. Embury v. Conner, 3 N. Y. 511; Sherman v. McKeon, 38 N. Y. 266.

But I have not found it necessary to determine definitely whether, upon the second ground alone, complainant is entitled to succeed in this court. This part of the case, however, has, in my judgment, an important bearing on complainant's third position; since I think the circumstances referred to fully justified Mrs. Smith and her daughter, the complainant, in supposing and believing that the effect of the improvement was to give her the beneficial title to the strip in question, and that she and her assignee, the complainant, acted in good faith on that assumption. In answer to this inference, defendant contended that the protest of Mrs. Smith's husband, above set forth, shows that she had notice of the fact that defendant had the legal title to the land in dispute. But on that point it is to be observed—*First*, that the land here in dispute was marked on the map as belonging to Wetmore, who was a party, so to speak, to the assessment, and bound thereby; *second*, that Mrs. Smith's son, who prepared the protest, swears that his mother knew nothing of it; *third*, that he concluded, upon consideration, that the effect of the proceeding was to vest the beneficial title in the strip in his mother, and so paid the assessment without further question; *fourth*, that the complainant is not chargeable with knowledge of the protest, and she and her husband deny all notice of any defect of title.

This brings us to the third ground, namely, estoppel by acquiescence and silence. Here complainant relies upon the familiar maxim that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent; or, as it is otherwise expressed, *qui tacet, consentire videtur; qui potest et debet vetare, jubet si non vetat.* In Wendell v. Van Rensselaer, 1 Johns. Ch. 344, Chancellor KENT, at page 354, says: "There is no principle better established in this court, nor one founded on more solid foundations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." This doctrine was approved by Chancellor PENNINGTON in Ross v. Railroad Co., 2 N. J. Eq. 422, at page 434; by the court of appeals in Doughty v. Doughty, 7 N. J. Eq. 643, at page 650; and has since been recognized in many cases in this court, and was acted upon by Chief Justice BEASLEY, sitting for the chancellor, in Erie Ry. Co. v. Delaware, L. & W. R. Co., 21 N. J. Eq. 283, at page 288 et seq., and by Vice-Chancellor BIRD in Swayze v. Carter, 41 N. J. Eq. 231, 3 Atl. Rep. 706.

The only question that has ever been raised as to the value of the maxim is that its application to particular cases is sometimes difficult and embarrassing, and requires great care and discrimination. See Philhower v. Todd, 11 N. J. Eq. 312, at page 315. But this may be said of all the fundamental maxims and principles of equity, and must not deter the equity judge from applying them where properly applicable. Several canons have been suggested by the judges as guides in this work, but, in construing them, we must not lose sight of the facts in the particular case in which they have been enunciated, and must interpret them accordingly. Lord CRANWORTH, in the house of lords in Ramsden v. Dyson, L. R. 1 H. L. 129, at page 141, after stating the principle with great clearness, says that, in order that the maxim shall be applicable to a case of this sort, viz., the estoppel by expenditure of money on land, it must have three features—*First*, the person expending the money must honestly suppose himself to be the owner of the land; and, *secondly*, the real owner, who encourages the expenditure by his silence, must know that the land belongs to him, and not to the other; and, *thirdly*, that the other is acting on an erroneous belief as to its ownership. The canon was applied by Chancellor RUNYON in Kirchner v. Miller, 39 N. J. Eq. 355.

With regard to the first of these requisites, I have already shown that Mrs. Smith and her grantee, the complainant, were fully justified in supposing, and did actually suppose, that the land belonged to them. But counsel for the defendant insisted that both Mrs. Smith and complainant are chargeable with notice of the record title of defendant, and argued that they had no right in the face of it to suppose that they had title. I cannot accede to this argument. In the first place, I do not understand that the strength of complainant's proposition depends at all upon her want of knowledge that defendant held the legal title to this land. If she be chargeable with full knowledge of all the record discloses in that respect, still the question remains, were not she and her mother justified in supposing that this strip, reclaimed, so to speak, by the municipal action from an ancient highway, became, in some way, and as a result of those proceedings, her property? But if the case were wanting in that element, still I do not think defendant's position tenable. Courts of equity have in many cases given parties the benefit of an honest supposition as to title, where the slightest examination of the record or other equally available source of information would have disclosed their error. In fact, to exclude the application of the maxim from cases where the party has implied or constructive notice of title from the rec-

ord, would confine its application to a very narrow field. Absence of notice, both actual and constructive, of the adverse title, would, in many cases, give the party the benefit of the plea of *bona fide* purchaser without notice, and dispense with the necessity of setting up estoppel *in pais*. Chancellor ZABRISKIE in Dellett v. Kemble, 23 N. J. Eq. 58, held a party entitled to equitable aid against a judgment creditor of his grantor where the judgment creditor had stood by, and, without notice, permitted the former to build on the property in the honest belief that it was free from incumbrance, when he could have discovered the judgment by a search. In Town v. Needham, 3 Paige, 545, the title of Harvey, one of the defendants, to an undivided one-fourth of the premises at the death of his grandmother, clearly appeared by the will of the former owner, which was a part of complainant's chain of title; but he was granted relief against Harvey, on the ground that he bought and made improvements in the honest supposition that the other tenants in common, through whom he derived title, had in some way acquired and were the owners of the whole title. So in Brown v. Bowen, 30 N. Y. 620, the title, which was barred by estoppel, was found on the public record. In Storrs v. Barker, 6 Johns. Ch. 166, the plaintiff claimed under the devise of a married woman to her husband, and was chargeable with the knowledge that it was void; and it was held that he was justified in supposing that the title had been validated by some action between the devisee and the heir at law, and the heir at law, having stood by and encouraged the purchase by plaintiff from the devisee, was held estopped. In Chapman v. Chapman, 59 Pa. St. 214, where the plaintiff held under a long lease, and the defendants held in severalty parcels of the whole tract under subsequent conveyances from the same original owner, and plaintiff was held estopped from setting up his lease by his positive encouragement as to defendant Chapman, and by his mere silence as to defendant Gansamer, I infer that plaintiff's lease was a matter of record; since, if not recorded, defendants could have pleaded that they were *bona fide* purchasers for value without notice, and need not have relied upon the estoppel.

The position that, in general, record notice of the title is sufficient to defeat the estoppel, where it rests on mere silence, receives qualified support from Prof. Pomeroy in his treatise on Equity Jurisprudence, § 810; and also from Mr. Bigelow in his last edition of his treatise on Estoppel, 594. I have examined the cases cited by these authors in support of the text, and they are all distinguishable from the case in hand. They each lack one of its important features, viz., that the person sought to be estopped by his silence knew, or had reason to suppose, that the person asking the protection of the estoppel was acting in good faith, on an erroneous supposition as to the title. In Fisher v. Mossman, 11 Ohio St. 42, the contest was between a mortgagee and the purchaser of the equity of redemption at sheriff's sale under execution against the owner of the equity. The mortgagee was present at the sheriff's sale, and did not give notice of his mortgage, which was recorded, and it was held that he was not estopped by his silence, in the absence of any notice or reason to suppose that the purchaser was ignorant of the existence of his mortgage. In Knouff v. Thompson, 16 Pa. St. 357, it appeared affirmatively that the defendant knew of plaintiff's claim, and that his own title was defective, and, moreover, the improvements made were of very slight value. In Hill v. Epley, 31 Pa. St. 331, the contest was between one tenant in common and the purchaser at sheriff's sale of the interest of the other tenant in common, under judgment and execution against him. The matter relied upon in estoppel by the purchaser at sheriff's sale was that the grantor of the party now claiming against him had been present at the sheriff's sale, and had failed to give notice of his title. When the case was first before the court, in 7 Watts, 163, the opinion and decision was favorable to the purchaser at sheriff's sale, and the remarks of the court and citation of authorities found on page 168 in support of the estoppel are valuable. On a retrial a verdict was rendered in accordance with this opinion in favor of the purchaser at sheriff's sale, and against the owner of the outstanding half interest, and judgment thereon was reversed by the court in *banc*, in an opinion by STRONG, J. On page 334, 31 Pa. St., he says: "It seems also to be well settled that silence in some cases will estop a party against speaking afterwards. Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterwards be permitted to set up a claim to that land against the purchaser. His silence then becomes a fraud. But silence, without such knowledge, works no estoppel. It is only when silence becomes a fraud that it postpones." And again, (page 335:) "Clearly, if David Witherow [the plaintiff's grantor and one of the tenants in common] had not attended the sheriff's sale, nothing would have been required of him, after he had his deed upon record. This is conceded. But, if it be admitted that his presence at the sale imposed upon him the duty of giving other notice than that which his recorded deed furnished, and which was consequently known to Epley, it must be because he saw that the purchaser was still acting under an erroneous belief that the whole title was somehow in Samuel, [the other tenant in common, and defendant in the execution.] Nothing else could make his silence work a fraud. But how could he see that? And how is such knowledge affirmatively brought home to him? There is no evidence of any such erroneous belief. The land was being sold as the property of

Samuel Witherow, it is true. But Samuel had an interest in the land. Neither the execution nor the sheriff nor the crier asserted that that interest amounted to the entire fee-simple, or to an estate in severalty. The sheriff had no right to define what the interest was. The writ was just such a one as it would have been if it had been known by every person present at the sale that Samuel Witherow owned but an undivided moiety. It is impossible under such circumstances, to see how David's silence could be construed into an admission that Samuel owned the whole, because there was no assertion by the writ, by the sheriff, or by any one that he did. It is equally impossible to discover how David could have supposed that Epley was bidding under an impression, for there was nothing to warrant it, and a deed on record showing the contrary, of the contents of which not only the law presumed, but he had a right to presume, every bidder knew. If the sheriff had offered for sale a tract of land belonging to David in severalty, in which Samuel had no interest, the consequences of silence might have been different."

I believe this to be a correct statement of the doctrine, and I conceive that it fully disposes of the attempt to avoid the effect of the silence in this case by an appeal to the record title. The question is not so much what the party setting up the estoppel might or ought to have known or supposed, as what he actually did know and suppose, to the knowledge of the other party. The New York case, (Rubber Co. v. Rothery, 107 N. Y. 310, 14 N. E. Rep. 269,) much relied upon by defendant, is clearly distinguishable. It lacks the feature of the one party acting on the mistaken supposition that he owned the other party's land, and the other party knowing of the mistake. The case was this: Defendants owned both sides of a stream at a certain point. Further down they owned but one side, while the plaintiffs owned the other side. Defendants built a dam across the stream above on their own land, and dug a race-way from it on their side of the stream, and built works, which, when put in use, resulted in diverting the whole stream, and carrying it down past the plaintiff's land, before it was returned to its natural channel. Plaintiff saw these works erected, and made no objection. Defendants set their works in motion, and diverted more than half the waters of the stream, and for that diversion plaintiff brought suit. Now, as defendants clearly had the right to divert one-half the water of the stream, and it did not appear that a beneficial use of the works could not be made with the one-half, or that plaintiff had notice of anything of the sort, it is clear that there was nothing in all that plaintiff saw defendants doing to lead plaintiff to suppose either that defendants supposed that they had a right to divert all the water, or that they intended to do so, or must necessarily do so in order to enjoy their works to their full extent; and besides, it does not appear that the defendants supposed that they had a right to divert all the water, or that, as before remarked, the plaintiff knew or supposed that the defendants were acting on that supposition. The case is somewhat in line with Cooper v. Carlisle, 17 N. J. Eq. 525, at page 535. In Kirchner v. Miller, 39 N. J. Eq. 355, the complainant made a mistake of a few inches in surveying the line between his land and the defendant's, for which mistake the defendant was not responsible, and of which he was not aware until after complainant had built. The defendant could not be guilty of any acquiescence unless he knew that the complainant was building over on his land, which he did not. The case lacks the features mentioned by Lord CRANWORTH. Moreover, the complainant was able to restore himself at a trifling expense, as shown by the opinion. Brant v. Coal Co., 93 U. S. 326, is also clearly distinguishable. There a party, who held a life-estate only, conveyed and took back a purchase-money mortgage which was assigned to the owner of the fee in remainder, who foreclosed. The deed of assignment recited the title truly. Defendant's grantor purchased at the foreclosure sale. Plaintiff was the owner of the remainder, and at the death of the life-tenant brought suit in equity to restrain mining, etc. Defendant set up estoppel arising out of the foreclosure, and the court below dismissed the bill on that ground. This decree was reversed on appeal, by a divided court. Justice FIELD, at page 335, says: "The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case. The doctrine of *caveat emptor* applies to all judicial sales of this character; the purchaser takes only the title which the mortgagor possessed. And here, as a matter of fact, he knew that he was obtaining only a life-estate by his purchase. He so stated at the sale, and frequently afterwards. There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title inconsistent with the fact; but, on the contrary, it is abundantly established by the evidence in the record that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company, in 1854, they always claimed to own seven-eighths of the reversion. The assignment itself recited that the widow had owned, and had sold to that company, a life-interest in the property, and that they had acquired the interest of the heirs." Brewer v. Railroad Co., 5 Metc. 478, was an action of ejectment, where the party was precluded from setting up equitable estoppel. In Baldwin v. Richman, 9 N. J. Eq. 394, Baldwin claimed title by conveyance from Benjamin Richman, and was defeated in an action of ejectment by the heirs of Jeremiah, brother of Benjamin. Jeremiah being the sole owner

of the fee of the land in question and other lands, but supposing that he owned them as tenant in common with his brother Benjamin, applied to the orphans' court for and procured partition, in which the lot in controversy was set off to Benjamin, who entered, and, after the mistake was discovered, conveyed to Richman, who purchased with full notice of the true state of the title. The bill prayed relief against the ejectment. Chancellor WILLIAMSON dismissed it on two grounds: *First*, (page 398,) that the bill "does not allege that Benjamin took possession of the land and improved it under the impression that the land was his own, nor is there any allegation that it was the conduct of Jeremiah that induced him to take possession and make the improvements. From anything that appears in the bill to the contrary, he knew that Jeremiah was acting under a mistake, and took advantage of it." *Second*, (page 399,) that there was an allegation in the bill, but no admission or proof, that Benjamin had made improvements or expended moneys on the land, hence no injury was shown. The case is in all its aspects clearly distinguishable from the one in hand. From the numerous modern cases in other jurisdictions, in which the maxim has been applied, I cite the following, which seem to have been well considered: Canal Co. v. King, 16 Beav. 630, 22 Law J. ch. 604; Slocumb v. Railroad Co., 57 Iowa, 675, at page 682, 11 N. W. Rep. 641, 644; Ross v. Thompson, 78 Ind. 90, 96; Markham v. O'Connor, 52 Ga. 198; Chapman v. Pingree, 67 Me. 198; Stone v. Tyree, 30 W. Va. 687, 5 S. E. Rep. 878; Allen v. Shaw, 61 N. H. 95; Morgan v. Railroad Co., 96 U. S. 716.

In the case in hand I find it impossible to suppose that defendant did not understand that the complainant was making her improvements in the complete confidence that she had title to the whole of the lot. It would have been an act of the greatest folly, if not outright insanity, in her, to have made the improvements if she had supposed any other person owned the strip in question. The transaction spoke for itself; and, as before remarked, there was no pretense at the hearing that defendant did not so understand. He does indeed swear that he thought "these parties" were better prepared to know how much land he had there than he was. But the context shows that he referred merely to the quantity of his land cut off by the change of street lines, and not to the state of the minds of the "parties" alluded to, as to their right to use and occupy it as their own. He did not swear that he did not suppose that Mrs. Sumner made her improvements in the honest belief that she had full right to the perpetual use and occupation of the strip in controversy. With regard to the knowledge by the defendant that a part of the land in the old street to which he had the legal title lay to the south of the southerly line of the new street, I find no difficulty. An inspection of the map shows that he must have known it, and, besides, he not only does not deny it on the stand, but distinctly admits it. He swears that he did not know how much he had. In fact, defendant's counsel admitted in his brief that his client knew that he owned some land at the point in question, but did not know the quantity. But defendant's counsel further insists that no equitable estoppel arises in this case, because the dwelling erected by complainant was on her own land, and the actual improvements put on the land in dispute were so trifling in amount and cost as not to create a duty on his part to speak. I cannot accede to the proposition necessarily assumed in this position, viz., that it is necessary that there should be an actual use or occupation of the very land in question by some fixed and permanent structure in order to raise an estoppel. The true ground of equitable estoppel I conceive to be that the party, in reliance upon the existence of a certain state of facts, has so changed his position that he cannot be restored to his former position, and will suffer serious loss if the facts prove to be different from what he supposed them to be; and the estoppel arises against the party who is responsible for his action on such mistaken belief, and it operates to prevent him from asserting the contrary. Now, it is palpable that actual occupation by building on land is not the only use a party may make of it, the deprivation of which would result in serious injury to him. For instance, suppose in this case complainant's lot had been but 100 feet deep and 25 feet wide, and defendant's legal title had extended across the whole front, and to a depth of 10 feet, and complainant had built upon the whole lot, except the 10 feet owned by defendant, leaving that as a front yard to his buildings. It is at once apparent that the assertion of title by the defendant to the 10 feet would have been utterly destructive of the value of complainant's structure. Now, the difference between the case just supposed and the one in hand is one of degree merely.

Counsel in this connection further relies on the fact that the strip claimed by defendant does not reach across the whole front of complainant's lot, but leaves a space of about 30 feet next to Mrs. Smith's line by which complainant can have access to the street. But that space is covered by the Wetmore title, and it was admitted at the hearing that it had not been transferred to Mrs. Smith or to the complainant, unless such transfer resulted in equity from the proceedings before referred to. So that, if the Wetmore title is enforceable as well as defendant's, complainant is shut up to a mere right of way by necessity across her mother's lot. But admitting that complainant has, after deducting the lot claimed by defendant, a frontage on the street of 30 feet, or one-fifth of the width of her lot, it is palpable that the utility as well as the market value of her property will be very injuriously affected if defendant may take exclusive pos-

session of the piece in dispute; and it is equally clear, as before remarked, that defendant must have perceived and known that complainant was acting on the assumption that she owned this piece, and that she would not have built her house if she had not so supposed. If ever there was a case in which the duty of the party to speak was clear, it seems to me it was this case, and that the language of Lord CRANWORTH in Ramsden v. Dyson, supra, applies: "A court of equity considers that, when the one party saw the mistake into which the other party had fallen, it was his duty to be active and state his adverse title; and that it would be dishonest for him to remain willfully passive on such an occasion in order afterwards to profit by the mistake which he might have prevented." For these reasons, I think the complainant is entitled to relief, and it only remains to determine its nature and extent.

Courts of equity do not, in all cases of this sort, push the estoppel to the extent of passing the equitable title, but in proper cases permit the owner of the legal title to hold possession upon terms of compensating the party who has innocently made improvements upon the erroneous supposition; indemnity to the party entitled to the estoppel being in all cases the end aimed at. It was not, however, suggested at the argument or in the briefs of counsel that remedy by compensation in money would be proper in this case; and it is palpable that it could not. The value of the strip in question for use by itself must be quite insignificant, and the injury to complainant by reason of its exclusive occupation by another is not easily ascertained or measured in dollars and cents. The only mode in which complainant can be fully indemnified is to be protected in the perpetual enjoyment of the land in question, and for that purpose the defendant should be perpetually enjoined from asserting his legal title, and such will be the decree.

SHERIN et al. v. BRACKETT.

(30 N. W. 551, 36 Minn. 152.)

Supreme Court of Minnesota. Dec. 8, 1886.

Appeal from district court, Hennepin county.

Smith & Reed, for appellants, Sherin and others, by their guardian ad litem. Fish, Evans & Holmes, for respondent, Brackett.

BERRY, J. This is an action in the nature of ejectment, in which the plaintiffs, seeking to recover possession of a strip of land, alleged that on October 1, 1885, and long before, they were and now are owners thereof; and further that they and their ancestors, from whom they derive title, have been in the actual, peaceable, open, notorious, adverse, and continuous possession thereof for more than 25 years prior and up to October 8, 1885; that on that day, while they were in such actual possession, defendant unlawfully entered upon said strip of land and wrongfully ejected them therefrom, and ever since wrongfully detains possession thereof.

Doubtless the intent of the pleader was to set up title in fee based upon what is called adverse possession. But as the greater includes the less, the complaint sufficiently pleaded actual possession at the time of the defendant's alleged entry, so that if upon the trial the plaintiffs failed to make out adverse possession, such as would give them title as against the holder of the paper title, still, if they proved actual possession, they might properly insist that they were within the allegations of their complaint, and had made out a case as against a mere trespasser. For as against one showing no title in himself, possession is title. Wilder v. City of St. Paul, 12 Minn. 192 (Gil. 116); Rau v. Railroad Co., 13 Minn. 442 (Gil. 407); Sedg. & W. Tr. Title Land, §§ 717, 718.

The evidence upon the trial below in the case at bar showed that plaintiffs were in possession of the strip of land in controversy at the time of defendant's entry upon it, and defendant gave no evidence of any right or title in himself. In this state of the evidence the plaintiffs were entitled to judgment, and hence the trial court erred in dismissing the action at the close of plaintiff's testimony. As this point is insisted upon by plaintiff it cannot be disregarded, and so there must be a new trial.

This disposes of the present appeal, but (as we surmise) not of the real merits of the controversy, and therefore, with reference to a new trial, we deem it expedient to determine certain other questions raised upon the argument.

And, first, though there are a few cases which hold that the statutory period of adverse possession, which will bar an action for the recovery of land, may be made up by tacking together the periods of the adverse possession of several successive holders between whom there is no privity (see Scales v. Cockrill, 3 Head, 433; Smith v. Chapin, 31 Conn. 530; Davis v. McArthur, 78 N. C. 357), the rule laid down by the great majority of courts and by the text writers, and supported by the weight of authority, and which must be regarded as the true rule, is that privity between successive adverse holders is indispensable. And this, upon the principle that unless the successive adverse possessions are connected by privity the disseizin of the real owner resulting from the adverse possession is interrupted, and during the interruption, though but for a moment, the title of the real owner draws to it the seizin or possession. Melvin v. Proprietors, etc., 5 Mete. (Mass.) 15; Haynes v. Boardman, 119 Mass. 415; McEntire v. Brown, 28 Ind. 347; Jackson v. Leonard, 9 Cow. 653; Wood, Lim. § 271; San Francisco v. Fulde, 37 Cal. 349; Crispen v. Hannavan, 50 Mo. 536; Shuffleton v. Nelson, 2 Sawy. 540, Fed. Cas. No. 12,822; Ang. Lim. §§ 413, 414; Sedg. & W. Tr. Title Land, §§ 740, 745–747; Riggs v. Fuller, 54 Ala. 141.

Second. The privity spoken of exists between two successive holders when the later takes under the earlier, as by descent (for instance, a widow under her husband, or a child under its parent), or by will or grant, or by a voluntary transfer of possession. Leonard v. Leonard, 7 Allen, 277; Hamilton v. Wright, 30 Iowa, 480; Jackson v. Moore, 13 Johns. 513; McEntire v. Brown, supra; Weber v. Anderson, 73 Ill. 439; Wood, Lim. § 271; Sedg. & W. Tr. Title Land, §§ 747, 748.

Third. While to operate as a bar adverse possession must be continuous, continuity will not be interrupted by the possession during any part of its period of one who occupies the premises as a tenant of the alleged adverse possessor. In such cases the tenant's possession is that of his landlord. San Francisco v. Fulde, supra; Rayner v. Lee, 20 Mich. 384; Sedg. & W. Tr. Title Land, § 747.

Fourth. Possession, to be adverse, so as to bar an owner's right of action, must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely. Sedg. & W. Tr. Title Land, § 731 et seq.

This is all which we deem it necessary to say in this case; for, as there is to be a new trial, we forbear to comment upon the evidence.

Order denying new trial reversed, and new trial awarded.

DEAN v. GODDARD.

(56 N. W. 1060, 55 Minn. 290.)

Supreme Court of Minnesota. Nov. 17, 1893.

Appeal from district court, Hennepin county; Canty, Judge.

Action by Alfred J. Dean against Fred E. Goddard to quiet title to realty. Plaintiff had judgment, and, from an order denying a new trial, defendant appeals. Affirmed.

C. J. Cahaley and Little & Nunn, for appellant. Woods & Kingman, for respondent.

BUCK, J. The question raised in this case is whether the plaintiff has acquired title by adverse possession to the premises described in the complaint, viz. the front half of lots 1 and 2 in block 67, in the city of Minneapolis. The action was commenced in August, 1891. In his complaint the plaintiff alleges that he is in possession, and is the owner in fee simple, of the premises above described, and that the defendants claim some estate or interest in the premises adverse to the plaintiff, and prays that the claims of the respective parties be adjudged and determined, and that title to said premises be decreed to be in the plaintiff. The defendant Goddard answered, and alleged the title in fee to be in himself. The plaintiff replied, and such reply will be referred to hereafter. Plaintiff's contention is that he acquired title by possession held adversely for such a length of time as to create a title in himself.

Under Gen. St. 1878, c. 66, § 4, the time limited for commencing actions for the recovery of real property was fixed at 20 years; but on April 24, 1889, the law was changed to 15 years,—not to take effect, however, until January 1, 1891. The law, as amended, would be applicable to actions commenced after January 1, 1891, and prior to the time of the commencement of this action, in August, 1891; but this would not render the law existing prior to the amendment inapplicable to causes of action, when there was 20 years' adverse possession before the time when the change took effect. The period, however, relied upon, need not be the 20 years immediately preceding the 1st day of January, 1891. It would be sufficient if the possession relied upon was continuous for 20 years up to any certain or definite time. Of course, the 20 years would have to be complete before the bringing of the action; but such 20 years need not, necessarily, be those next before the time when the action is commenced. In this case, if the inception of the plaintiff's adverse possession was in the months of June or August, 1866, and became perfect by continued adverse possession until the month of June or August, 1886, then the title thereby created would not be lost or forfeited by any subsequent interruption of the possession, unless by some other adverse possession for such a length of time as would create title in the possessor.

The court below found the allegations in the plaintiff's complaint to be true, and that he was, at the time of the commencement of this action, the sole owner, in fee, and in the lawful possession, of the premises described in the complaint, and that he and his grantors and predecessors in interest had been in the open, continuous, exclusive, and adverse possession of the premises, with color of title, and paying taxes thereon, for a period of 20 years, and that he was entitled to the decree and judgment of the court declaring him to be the absolute owner of the premises. We think a title acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed. The legal effect not only bars the remedy of the owner of the paper title, but divests his estate, and vests it in the party holding adversely for the required period of time, and is conclusive evidence of such title. To say that the statutes upon this subject only bar the remedy, as some authorities do, is only to leave the fee in the owner of the paper title; thus leaving the owner with a title, but without a remedy. We think the better and more logical rule is to hold that the occupier of the premises by adverse possession acquires title by that possession, predicated upon the presumption or proven fact that the prior owner has abandoned the premises. Adverse possession ripens into a perfect title. This title the adverse possessor can transfer by conveyance, and when he does so he is conveying his own title, and not a piece of land where the title is in some other person, who is simply barred of any remedy from recovering it. See Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209; Baker v. Oakwood, 123 N. Y. 16, 25 N. E. Rep. 312, and cases there cited. Now, if there is any cloud resting upon such title, he has a legal right to apply to the court, and have his rights adjudicated, and the title perfected by judgment record, if the evidence sustains his claim. Considerations of public policy demand that this should be so, for the claim of title to lands can thus be found of record, instead of resting in parol, with all of its incidental dangers and trouble in establishing title.

Now, let us consider the question raised by the defendant, as to whether one of the plaintiff's predecessors, Washburn, entered into the adverse possession of the premises June 1, 1866, or August 28, 1866. The plaintiff claims such entry was on the 1st day of June, and the defendant insists that the true date, if there was any such adverse entry at all, is shown by plaintiff himself, in his reply, to be August 28, 1866. The importance of these dates arises from the fact that there is evidence tending to show an adverse possession of the premises by the predecessors of plaintiff until the middle of July, 1886;

and if the period of 20 years commenced June 1, 1866, of course, the expiration of that period would be June 1, 1886, and if the period commenced August 28, 1866, the 20-year period would expire August 28, 1886. Thus, the true date becomes material. The plaintiff, in his amended reply, inserted the following allegation, viz.: "That on or about the 1st day of June, 1866, and more than fifteen years prior to the commencement of this action, said William D. Washburn, under the deed hereinbefore recited, executed to him by said Lindley, and claiming thereby to be the owner of said premises, entered into possession and actual occupation of the same." The deed referred to bears date August 28, 1866. It may be that there is sufficient undisputed evidence to show an adverse possession during this particular time, but we think that, under the circumstances, the parties are entitled to the opinion of this court upon this phase of the case. The fault of the defendant's position is this: That he allowed the plaintiff to introduce and prove beyond dispute, by parol evidence, without objection, that Washburn entered upon these premises June 1, 1866. The rule, therefore, that the written allegations of the pleadings should control, does not apply. The defendant did not move to have the pleadings made certain and definite, nor to compel the plaintiff to elect upon which of the dates he would rely as the time of Washburn's entry upon the premises, but remained silent, and allowed the date of June 1, 1866, to be undisputably proven by the plaintiff. The allegations in the reply were repugnant as to the dates of Washburn's entry, but the defendant, by his conduct, waived his right to insist now that the date of such entry should be determined as of August 28, 1866. He is estopped by the admitted parol evidence from insisting that the written pleadings should be construed in his favor, and against the plaintiff.

There is no dispute, however, that Washburn did procure a deed of the premises from Lindley dated August 28, 1866; and the defendant therefore contends that Washburn's entry, if adverse at all, should only be considered as having commenced on the date of the deed. To support this contention, he invokes the doctrine that one who enters upon land under a mere agreement to purchase does not hold adversely, as against his vendor, until his agreement has been fully performed, so that he has become entitled to a conveyance. This doctrine is not applicable to this case. Washburn's entry and holding was not under this defendant, nor any of his predecessors holding paper title. As we have already stated, it appears that he was in possession on the 1st day of June, 1866; and whether by permission of Lindley, or by his own voluntary entry, is immaterial, as to his rights against parties other than Lindley, and Lindley is not complaining, or questioning his rights, or time of entry. Nor is defendant claiming title under Lindley. If permissive possession, with parol executory conditions attached, would not constitute adverse possession as between the parties, yet it might constitute adverse possession as against third persons or strangers. Washburn's entry was adverse as against those under whom defendant claims by paper title. If, therefore, Washburn's entry, of June 1, 1866, was his own adverse act, and he so continued in possession of the premises until long after August 28, 1866, there is no need of considering the doctrine of tacking, or the necessity of the continuity of possession. Obtaining a deed to the premises from Lindley would not destroy Washburn's previous adverse possession, nor break its continuity. He had a right to strengthen his adverse claim to the premises, if possible, by as many written conveyances from other parties claiming any interest therein as he saw fit, and thus give him color of title, and perhaps define the boundaries of the premises claimed by him.

The essential ingredients necessary to create title by adverse possession are now so well defined and understood that we shall not enter into any argument or discussion to show what they are. We merely state them in this connection that we may the more conveniently apply them to the undisputed facts in this case. "To be adverse, possession must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely." Sherin v. Brackett, 36 Minn. 152, 30 N. W. Rep. 551. This leads us to the question raised by defendant,—that the court below did not find, specifically, that plaintiff's possession, or the possession of his predecessors, was hostile. But it did find that such possession was open, continuous, exclusive, and adverse during the requisite period. The greater includes the less. If it was adverse, it was hostile. In Sedg. & W. Tr. Title Land. § 749, it is said that "it is tautology to say that adverse possession must be 'hostile.'" Such hostility may be manifested by acts of possession and use of the premises, plainly visible, actual, open, and continuous, such as appeared in this case, by using the premises for many years as a lumber yard, building a barn and shed thereon in 1866 or 1867, and keeping the same on the premises until they burned down, in March, 1884, and keeping a large number of horses on the premises and in the stables for many years. Also, storing machinery, lamp posts, castings, and other personal property, putting a large sign on the lot, with notice thereon that it was for rent, for a long term of years, were acts of hostility, as tending to show very strongly that some one was assuming dominion over the premises, and had intended to, or was usurping the possession.

If, as was said by the court in Stephens v. Leach, 19 Pa. St. 263, the adverse possessor "must keep his flag flying," yet it is no less essential that the actual owner

should reasonably keep his own banner unfurled. The law, which he is presumed to know, is a continual warning to him that if he shall allow his lands to remain unoccupied, unused, unimproved, and uncultivated, by adverse possession for a long period of time, fixed by law, he may be disseised thereof, and deemed to have acquiesced in the possession of his adversary. In this case, the actual owners by paper title have never occupied the premises since the first owner obtained his title from the government, in 1855 or 1856. Considerations of public policy demand that our lands should not remain for long periods of time unused, unimproved, and unproductive. Taxes should be promptly paid. It nowhere appears that the owners by paper title have ever paid any taxes, but they have allowed the adverse occupants, during a period of many years, to pay nearly $5,000 taxes upon the premises. Payment of taxes shows claim of title. Paine v. Hutchins, 49 Vt. 314. We can readily understand how these statutes are called "statutes of repose." The burdens of government must be met; its educational interests provided for; its judicial, legislative, and executive functions maintained; and to do this our real property must be made productive, to the end, among other things, that taxes may be raised and paid from land not subject to continual litigation, but the titles thereto quieted. If the selfish, the indolent, and the negligent will not do this, there is no more merit in their claim than that of the adverse possessor, who does so, whatever may be said of the harshness of the statute of limitation. The settlement and improvement of the country, with its consequent prosperity, should be superior and paramount to the speculative rights of the land grabber, or selfish greed of those who seek large gains through the toil, labor, and improvements of others. The hostile possession of the adverse claimants in this case fully appears. The possession has been open, visible, hostile, and notorious, as appears from the evidence. It has been exclusive, for no one else has made any claim to it. Those who have been on the premises, other than plaintiff or his predecessors, have made no claim of right, but have paid rent to the adverse claimant, or were there simply as trespassers, which would not break the continuity of possession. The intent to claim may be inferred from the nature of the occupancy. Oral declarations are not necessary. Possessory acts, so as to constitute adverse possession, must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted. If a person should take possession of farm land, build a barn and shed thereon, and allow them to remain there for years, plow and cultivate and harvest the crops, paying taxes on the premises, and actually occupying them, for such a period of time, as is usually done by the actual owners of such farm land, with such open, notorious, visible, hostile, and exclusive acts as would destroy the actual or constructive possession of the true owners, if continued long enough, it would ripen into a complete title, although there might not be actual residence upon the premises by the adverse claimant or possessor. The acts necessary for such purpose might be different with a city lot. The question is as to what purpose it may be ordinarily fit and adapted, and reasonably used. In a large manufacturing city, with vast lumber interest, the use of a lot for piling lumber thereon, and there storing it or keeping it for sale, might be the best use to which such lot could possibly be adapted. And, as part of such business, the building of a barn and shed thereon, for keeping and stabling horses used in procuring logs, as a part of such lumber business, would constitute a very strong ingredient of adverse possession.

The mere fact that time may intervene between successive acts of occupancy, while a party is engaged in such lumber business, as by taking his teams from such stable and shed, and using them in procuring logs to be sawed into lumber to be by him piled and stored upon such premises, does not necessarily destroy the continuity of possession. During such time, the lumber left upon the lot, the barn and shed there remaining, and various implements connected with such lumber business used upon the premises, would indicate that some one was exercising acts of domain over the lot, even though the party was occasionally and temporarily absent upon the business for which he was using such lot.

We think the whole record herein presents such a state of facts that the court below was justified in its finding and decision. If there was error in the court admitting testimony showing that sand was removed from the premises after the commencement of this action, it certainly could not have prejudiced the defendant. We find no prejudicial error, and the order of the court below, denying a motion for a new trial, is affirmed.

WHITAKER et al. v. ERIE SHOOTING CLUB et al.

(60 N. W. 983, 102 Mich. 454.)

Supreme Court of Michigan. Nov. 20, 1894.

Appeal from circuit court, Monroe county, in chancery; Edward D. Kinne, Judge.

Bill by Maria S. Whitaker and others against the Erie Shooting Club and Jay W. Keeney to quiet title to certain land. Judgment for defendants, and complainants appeal. Affirmed.

Willis Baldwin (Ira G. Humphrey, of counsel), for appellants. De Forest Paine, for appellee Erie Shooting Club. Ira R. Grosvenor, for appellee Keeney.

GRANT, J. The complainant Maria is the widow, and the other complainants are the heirs at law, of Harvey Whitaker, deceased, who died in June, 1890. Harvey Whitaker purchased the land in question in 1837. The object of the bill is to remove a cloud from their title, caused by a tax deed made by the state of Michigan, January 16, 1860, to Elias W. Hodges and Andrew J. Keeney, for the taxes of 1857, and a lease executed by Andrew J. Keeney to the Erie Shooting Club, August 28, 1889. The defendant Keeney answered, claiming title by adverse possession, and asking affirmative relief, affirming his title. The shooting club answered, admitting the execution of the lease, and of its corporation, and leaves complainants to their proofs on their other allegations.

The situation and character of the land: The land is a piece of marsh situated in the southeast corner of Monroe county, about 120 rods from the mainland, on the west, and a mile from the sea wall of the shore of Lake Erie, on the east. Between it and the mainland is mud, which is at times covered with water. Upon it is a large sulphur spring. Around the spring the land is a little higher, and, on a few acres, grows hay fit for use. At low water the land around this spring is from a foot and a half to two feet above the water. When the wind blows from Lake Erie the land is entirely submerged. The only way to reclaim it, so as to render it fit for cultivation, would be the erection of a dike around it, several feet high. The only use to which it can ever be put, aside from the cutting of the hay around the spring, is for hunting birds, muskrats, and mink, but its principal use is for hunting birds.

Abandonment by complainants' ancestor: From 1837 to 1892 neither the complainants nor their ancestor exercised any act of possession. For 10 years prior to his death, Harvey Whitaker lived in Detroit, 40 miles distant. Maria S. Whitaker testified on behalf of the complainants as follows: "Q. Do you know what became of his property? A. Well, it was overflowed. We had nothing to do with it. Q. What did you do with this spring lot? A. I don't know as anything. We all supposed it went. We considered it all lost. We thought it wasn't worth anything. Q. And you abandoned it? A. Yes. Q. You never paid any taxes on it? A. No, sir, I think not. I never knew any being paid. Q. When did you first know your husband left this property? A. I knew he bought it at the time, but, as I say, we had given it up. It was overflowed, and we supposed it was worth nothing. I don't suppose he knew it was worth anything." Prior to 1860 the land was sold for taxes to various parties, who took no steps to obtain possession.

Defendants' connection with the land: Mr. Hodges and Andrew J. Keeney knew that Mr. Whitaker had abandoned the land at the time of the purchase of the tax title. Their tax deed was placed upon record January 30, 1860. From that time to the present the taxes were assessed to and paid by them. Hodges and Keeney leased the right to trap upon the premises to various parties every year, some years receiving four or five dollars; some, twelve or fifteen; and other years receiving nothing. They also caused some willows to be planted near the spring, and occasionally cut hay. No other acts of actual possession are shown, except that they occasionally went to the land to look after it, as owners of land usually do. From 1860 to the commencement of this suit, it was understood by all living in the neighborhood that this was the property of Hodges and Keeney. On May 8, 1879, Andrew J. Keeney executed to the Bay Point Shooting Club a lease of the undivided half interest of the land, which interest is now the sole subject of controversy here, for the purpose of hunting and shooting snipe, wild fowls, and all other birds recognized as game by the laws of the state, and for all other purposes necessary and incident thereto, and for no other use or purpose. This lease was recorded November 15, 1880. This club immediately caused signs to be painted, and posted at various places around this land the following notice: "Lands of the Bay Point Shooting Club. All Trespassers will be Prosecuted. [Signed] A. J. Keeney, President." At the termination of that lease, and on August 28, 1889, Mr. Keeney executed a similar lease to the Erie Shooting Club, which was recorded March 22, 1890. During the occupancy by these clubs, these signs were placed in position every spring, and taken up every fall, because the ice would carry them away. Watchmen were also employed to keep off trespassers during the shooting season. These acts of possession continued from 1880 to the commencement of this suit, in 1893.

The requirements of an adverse possession necessary to establish title to real estate are well understood. The difficulty arises in applying these requirements to

each case as it arises. Each case, as a rule, must be controlled by its own facts and circumstances. The established rule of this court is, "It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in question." Murray v. Hudson, 65 Mich. 670, 32 N. W. 889. The occupation need not be such as to inform a passing stranger that some one is asserting title. If it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient. After long and intentional abandonment by the owner in this case, those under whom the defendants claim obtained a tax deed from the state of Michigan. They immediately placed this on record. This, of itself, was a sufficient disseisin to support an action of ejectment by the original owner. Hoyt v. Southard, 58 Mich. 434, 25 N. W. 385. The defendant at once commenced to exercise such acts of possession and ownership as were consistent with the character of the land. Evidence of the general understanding in the neighborhood that they were the owners, and that it was called theirs, was held competent, as tending to establish the notoriety of defendant's possession and claim of title. Sparrow v. Hovey, 44 Mich. 63, 6 N. W. 93. Pedes possessio is not indispensable. The land need not be fenced. Buildings are not necessary. Where the possession claimed was by cutting grass and pasturing cattle each year during the season, and planting trees, it was held to be evidence of a practically continuous, exclusive, and hostile possession. Sauers v. Giddings, 90 Mich. 50, 51 N. W. 265. Openly and notoriously claiming and using land in the only way it could be used without fencing or cultivation was held to establish adverse possession. Curtis v. Campbell, 54 Mich. 340, 20 N. W. 69. Cropping land, though no one was actually upon it, and nothing done thereon between harvest and recropping, were held to establish adverse possession. Cook v. Clinton, 64 Mich. 309, 31 N. W. 317. It may well be conceded that paying taxes, or assertion of title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, is not sufficient to establish title by adverse possession. But they are all competent evidence to be considered in determining the question. The notices which were posted around this land from early in the spring till late in the fall, every year for 12 successive years, was notice of an adverse title and possession. The owner, if he visited it, could not have failed to understand their meaning. They were inconsistent with the rights of the original owner of the fee. The land was then valuable for little else than shooting. Mr. Whitaker lived within 40 miles of this land for 10 years, with these open, notorious assertions of title and possession posted around the land from early in the spring till late in the fall. This substantially covered all the time during which this land could be used for any purpose except for hunting muskrats. The notice denied all right to use unless authorized by the club. We need not discuss the question of possession prior to the lease of the Bay Point Shooting Club. Ten years' adverse possession under the tax deed is sufficient. The decree will be affirmed. The other justices concurred.

LOVINGSTON et al. v. ST. CLAIR COUNTY.

(64 Ill. 56.)

Supreme Court of Illinois. June Term, 1872.

Appeal from circuit court, St. Clair county; Joseph Gillespie, Judge.

Wm. H. Underwood and Davis & Thomas, for appellants. G. & G. A. Koerner and Louis Houck, for appellee.

THORNTON, J. If the land of the riparian proprietor was bounded by the Mississippi, his right to the possession and enjoyment of the alluvion is not affected, whether the stream be navigable or not. By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river or other stream, whenever the increase is so gradual that it can not be perceived in any one moment of time.

The navigability of the stream, as the term is used at common law, has no applicability to this case. If commerce had been obstructed, or the public easement interrupted, or a question was to arise as to the ownership of the bed of the stream, then the inquiry as to whether the stream was navigable or not, in the sense of the common law, might be pertinent. No such question is presented. On this branch of the case, the only question is, have the United States, or the state, or the riparian owner, the right to the accretion?

If the river is the boundary, the alluvion, as fast as it forms, becomes the property of the owner of the adjacent land to which it is attached. On a great public highway, like the Mississippi, floating an immense commerce, and bearing it to every part of the globe, purchasers must have obtained lands for the beneficial use of the river as well as for the land. Can it be presumed that the United States would make grants of lands bordering upon this river, with its turbulent current, and subject to constant change in its banks by alluvion upon the one side and avulsion upon the other, and then claim all accretion formed by the gradual deposition of sand and soil, and deprive the grantee of his river front? If he should lose his entire grant by the washing of the river, he must bear the loss, and he should be permitted to enjoy any gain which the ever-varying channel may bring to him. If a great government were to undertake, under such circumstances, to dispossess its grantee of his river front, the attempt would be akin to fraud, and it would lose the respect to which beneficent laws and the protection of the citizen would entitle it.

We then assume that the act of congress of 1796 (1 Stat. 468, § 9), which declares all navigable rivers in a certain district public highways, has no bearing upon the questions to be considered. The riparian owner has a right to the alluvion, whether the stream be navigable or unnavigable.

Blackstone says (book 2, p. 262) as to lands gained from the sea by alluvion, where the gain is by little and little, by small and imperceptible degrees, it shall go to the owners of the land adjoining. "For de minimis non curat lex; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal condition for such charge or loss."

The same reasoning applies, with all its force, to the lands abutting upon the Mississippi river.

In Middleton v. Pritchard, 3 Scam. 510, this court said: "All alluvions belong to the riparian proprietor, both by the common and civil law."

In the case of Rex v. Yarborough, 3 Barn. & C. 91, land gained from the sea by alluvion or projection of extraneous matter, whereby the sea was excluded and prevented from overflowing it, was adjudged to be parcel of the demesne lands of the adjacent manor.

This question has been discussed with profound research and great ability by the courts in Louisiana, as to the accretions upon this same river, and the law clearly announced.

In Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, it was declared that the right to future alluvial formations was a right inherent in the property, an essential attribute of it, the result of natural law, in consequence of the local situation of the land; that cities as well as individuals had the right to acquire it, pere alluvuonis as riparian proprietor; and that the right was founded in justice, both on account of the risks to which the land was exposed, and the burden of protecting the estate. The court further assimilated the right to the right of the owner of lands to the fruits of a tree growing thereon, and said: "Such an attempt to transfer from the owner of the land to the city the future increase by alluvion, would be as legally absurd as if the legislature had declared that, after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city, and not to the owners of the orchard and gardens."

The same principle was declared in Banks v. Ogden, 2 Wall. 57, as applicable to Lake Michigan.

See, also, Mayor, etc., of New Orleans v. U. S., 10 Pet. 662; Jones v. Soulard, 24 How. 41.

The same doctrine is fully declared in a recent case: Warren v. Chambers, 25 Ark. 120.

To determine the title to the accretion, we must ascertain the locality of the land of the adjacent owner. We need not enter upon a discussion of the laws of congress and of the state, by virtue of which the county claims title, if the land previously granted by the United States was bounded by the river, and the accretion is attached to it.

Hilgard, the surveyor, testified that the accretion was all west of the Condaire tract. The only portion of the field notes we desire to call attention to is the following: "To a post on the westerly side of the river L'Abbe, or Cahokia creek, thence down the said river or creek, with the different courses thereof," and, "thence N. 85 deg. W. 174 poles to a post on the bank of the Mississippi river, from which thence N. 5 deg. E. up the Mississippi river, and binding therewith," (passing the south-

westerly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles,) "551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey No. —, claim No. 100." This survey was made in 1815. From the copy of the plat of it, from the custodian of the United States surveys, it will be seen that the line along Cahokia creek meanders with the stream, which was sinuous, and hence the call in the notes, "down the said creek with the different courses thereof."

A further examination of the plat will show that, though the line from "a post on the bank of the Mississippi river," "to a post northwesterly corner of Nicholas Jarrot's survey, claim No. 100," is a straight line, the river bank, as indicated by the plat, was also straight in 1815. The Condaire survey embraces three militia claims, which had been surveyed before, and which were confirmed to Jarrot.

One of the Jarrot surveys begins on the bank of the Mississippi, and thence to a point in the river, etc.

The defendants traced title from patents confirmatory of these several surveys, and they also proved title to "Bloody Island," which, when surveyed in 1824, was three-fourths of a mile north of the tract in controversy.

In behalf of the county, it is assumed that the patent to survey 579 contains no indication that the river is the boundary; that the west line of the Condaire claim, being the line next to the river, is identical with the west line of the militia claims; that Condaire took no portion of the militia claims, but only the fractions east of them and between them and Cahokia creek; that the lands granted were bounded by specific lines, and not by the river, and therefore the grants are limited grants, and the land in dispute is outside of their boundary lines.

Concede that the Jarrot survey did not make the river the boundary, by specific call, yet its beginning was on the bank of the river, opposite St. Louis, and thence it followed the river to a point in it. Hilgard testified that this survey was on the old bank of the river. It is, then, evident that at this time, which was some years prior to the Condaire survey, there was no land between the western line of the Jarrot survey and the river. All the plats introduced in evidence show that the river bank was straight, and the point in the river must have been made for the purpose of obtaining the bearing of the witness tree, a sycamore, 250 links from the point. It is manifest that the river was the boundary, and whether the grant was bounded by the river, or on the river, can make no difference as to the question involved. The grant may be so limited as not to carry it to the middle of the river, and yet not exclude the right to the alluvion.

A large number of cases have been cited by one of the counsel for the county, to establish that a grant is not carried to the centre of a stream, but stops at the bank, if the grantor describes the line as upon the margin, or at the edge or shore, and that these terms become monuments, and that they indicate an intention to stop at the edge or margin of the river.

This may be good law, and not affect the right of the defendants. They do not claim the bed of the stream, and the proof shows that the river does not run over the land in dispute at ordinary stages of water. Their claim, if established, does not obstruct the river, or interfere with its free navigation and use by the public.

But the Condaire survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any fractions between the Jarrot surveys and Cahokia creek, but the land, if any, between their western line and the river. The Condaire survey run up the river and binding therewith, and passed the southwesterly corner of the Jarrot survey, No. 579, at 6 poles. Language could not make it more plain that the western line was bounded by the river, and the plats confirm this view.

The only construction to be given to these grants is, that the United States had conveyed the land to the bank of the Mississippi. It follows that the grantees were riparian proprietors, and are the owners of the alluvial formations attached to their lands.

Unless such construction be given and adhered to rigidly, almost endless litigation must ensue from the frequent changes in the current of the Mississippi, and the continual deposits upon one or the other of its banks; the value of land upon its borders would depreciate, and the prosperity of its beautiful towns and cities would be seriously impaired.

Counsel say, at the time the locations were made there was no advantage of river front, no wharfage and no wood yards. This may be true, but even at this early period the grantees must have realized the vast importance of the Mississippi to them, and to all the people of the states bordering upon it, in the grand future soon to be unfolded. They must have seen the necessity, and accepted the grants for the purpose of securing an approach to the river.

From the proof, before 1819 a ferry was established across the river near to the land in dispute, and has been since in constant operation. Before the grant of the swamp and overflowed lands to the state, in 1850, a city had sprung up on the Missouri side of the river, and a prosperous village was growing on the Illinois shore. Before the survey by the county of the swamp lands, in 1852, a charter for a railroad had been granted by the state, which resulted in the construction of a road from Terre Haute, in the state of Indiana, to Illinoistown. Prior to the grant made by the United States in 1870, as shown by the plat offered in evidence, a number of railroad tracks had been constructed upon the ground formed by accretion, and an elevator erected and dykes for the use of wagons, and a large expenditure of money made by the ferry company for the preservation of the banks recently made.

It needed no prophetic eye to foresee, prior to the year 1850, these grand improvements which bring the products of an empire to the father

of waters. Their absolute necessity, and consequent construction, as an outlet for our immense produce, had been known for more than a quarter of a century before their completion. Their usefulness would be greatly crippled, and the public thereby seriously suffer, if ready access to the river was denied.

It would be a strained construction, to hold that, in making these grants, the United States reserved all accretions, and thus to deprive these proprietors of ferry privileges and the beneficial enjoyment of the river.

It is further contended that the lands are not accretions, as they were made by artificial, and not natural, means. It is not at all certain, from the proof, that the accretions were entirely the result of artificial structures, or that they would not have been formed without them. The construction of coal dykes facilitated the formation, and the soil was prevented from washing away by the expenditure of money by the ferry company.

Jonathan Moore, who had known the river since 1813, testified that the accretions had commenced to form before the construction of the dykes, and McClintock and Jarrot testified to the same effect.

Concede, however, that the dykes, to some extent, caused the accretions; they were not constructed for such purpose, and appellants had nothing to do with their erection. They were built for the accommodation of the public, and to secure an approach to the ferry boats, and the city of St. Louis did some work to preserve its harbor. Improvements were also made by the United States to throw the channel of the river towards the city.

The fact that the labor of other persons changed the current of the river, and caused the deposit of alluvion upon the land of appellants can not deprive them of a right to the newly made soil.

Chancellor Kent, after declaring the common law doctrine, that grants of land bounded on the margins of rivers, carry the exclusive right of the grantee to the centre of the stream, unless there is a clear intention to stop at the edge, says: "The proprietors of the adjoining banks have the right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement; and neither the state nor any other individual has the right to divert the stream and render it less useful to the owners of the soil." 3 Kent, Comm. 427.

If portions of soil were added to real estate already possessed, by gradual depositions, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the state nor any other individual can divert the water from him, artificial structures, which cause deposits between the old and new banks, should not divest him of the use of the water. Otherwise, ferry and wharf privileges might be utterly destroyed, and towns and cities, built with sole reference to the use and enjoyment of the river, might be entirely separated from it.

In Godfrey v. City of Alton, 12 Ill. 29, the public landing had been enlarged and extended into the river, both by natural and artificial means, and this court held that the accretions attached to and formed a part of the landing.

In New Orleans v. U. S., 10 Pet. 662, the quay had been enlarged by levees constructed by the city to prevent the inundation of the water, and the court held that this did not impair the rights of the city to the quay.

In Jones v. Soulard, supra, the intervening channel between the island and the Missouri shore had been filled up, in consequence of dykes constructed by the city, and the riparian owner succeeded.

In the case at bar, the accretions have not been sudden, but gradual, as we gather from the testimony. The city of St. Louis, to preserve its harbor, and to prevent the channel from leaving the Missouri shore, threw rock into the river, and the coal dykes were made to afford access to boats engaged in carrying across the river. The ferry company protected such accretions by an expenditure of labor and money.

The accretions, then, are partly the result of natural causes and structures and work erected and performed for the good of the public. Appellants should not thereby lose their frontage on the river and be debarred of valuable rights heretofore enjoyed. This would be a grievous wrong, for which there would be no adequate redress.

The judgment of the circuit court is reversed and the cause remanded.

Judgment reversed.

TATUM v. CITY OF ST. LOUIS.

(28 S. W. 1002, 125 Mo. 647.)

Supreme Court of Missouri, Division No. 1. Dec. 22, 1894.

Error to St. Louis circuit court; Leroy B. Valleant, Judge.

Ejectment by Joseph Tatum against the city of St. Louis. There was a judgment for defendant, and plaintiff brings error. Reversed.

J. T. Tatum and Leverett Bell, for plaintiff in error. Wm. C. Marshall, for defendant in error.

MACFARLANE, J. The action is ejectment to recover possession of a parcel of land in the city of St. Louis fronting 398 feet on the Mississippi river, and having a depth back of 307 feet. The land is claimed by the city as part of its public wharf. The answer was a general denial and a plea of the statutes of limitation. The case was tried to the court without a jury, and a verdict and judgment was rendered for defendant, and plaintiff appealed.

Plaintiff claims title through concession made to Joseph Brazeau, and confirmation thereof by act of congress in 1836. These concessions were bounded on the east by the Mississippi river, making a frontage on the river of 12 arpens. Plaintiff, who sues as trustee for Mrs. Virginia Lynch, claims title to the land in question as being accretions to the land so conceded and confirmed. Without tracing the title from Brazeau, as was done on the trial, it will be sufficient to say that in 1836 the original concessions were divided into five lots, each of which fronted 398½ feet on the Carondelet road, now avenue, and extended east to the river, and John B. Douchouquette about that time became the owner of lot 4 of said division. At this time the distance from Carondelet avenue to the river was about 1,800 feet, while at the trial it was about 2,800 feet. There was consequently about 1,000 feet between the east line of the lot, which was then the river bank, and the river bank as it is at present. The land in dispute is a part of this added land. In 1839 the west half of all five of these lots was subdivided into an addition to the city. Columbus street, running north and south through the center of these lots, formed the eastern boundary of the addition. In 1850 the title of that part of lot 4 lying between Columbus street and the river was vested as follows: Mrs. Lynch held an estate for life in the whole, and an undivided one-fourth of the remainder in fee; and Victoria Douchouquette, now Victoria Whyte, an undivided three-fourths of the remainder in fee. On May 17, 1870, by proper deeds, the title of Mrs. Lynch was vested in Joseph T. Tatum as trustee for her. Since the commencement of this suit, the interest of Mrs. Lynch has been assigned to Mrs. Whyte, who has been substituted as plaintiff. The evidence showed that as early as 1845 an island, known as "Duncan's Island," formed in the river opposite the land comprising the original Brazeau concession, but it is conflicting as to whether the southern end thereof extended as far south as the lot in question. Originally a part, at least, of the channel of the river flowed between the island and the Missouri shore. This part of the channel subsequently became a mere slough, and dikes were run out from the main shore, connecting it with the island. It does not appear that any of these dikes were built as far south as said lot 4. The slough was subsequently filled entirely, and the river bank was changed to the east side of the island. As has been said, the land thus formed extended east from plaintiff's original boundary about 1,000 feet. Main street was established over this new-made land, and the river front was declared by an ordinance of the city to be a public wharf. The land claimed in this suit is a part of that dedicated by the city as a wharf, but the evidence fails to show any improvement as such. Much evidence was introduced for the purpose of proving that the slough between the island and the shore was filled, and the new land formed, by means of the obstruction of the water by the dikes, by the construction of the Iron Mountain Railroad on trestles along the slough, by filling with dirt taken from other portions of the road, by filling by the city, and constructing the wharf. Defendant claims on this appeal that—First, it was not shown on the trial that defendant was in possession of the land sued for; second, that the action is barred by the statutes of limitation; third, that the land is not an accretion to plaintiff's original tract; fourth that the city is entitled to an easement in the land for a public wharf by virtue of a license conferred upon it by the plaintiff in 1851; fifth, that an outstanding title in Thomas Marshall was shown.

1. At the conclusion of plaintiff's evidence in chief defendant prayed the court to nonsuit him, for the reason that there was no evidence that it was in possession of the property at the commencement of the suit. This prayer was properly denied, for the reason that the possession of defendant was, by the plea of the statute of limitation, substantially admitted. By this plea defendant states "that it has been in open, notorious, continuous, peaceable, and adverse possession of the premises described in the petition since, to wit, 1850, claiming to be the owner thereof, against the plaintiffs and all other persons." Under this plea, possession at the commencement of the suit must be taken as admitted, and proof thereof was unnecessary.

2. At the conclusion of the evidence the court made this finding or declaration of law: "The proposition that the land in ques-

tion was formed by natural accretions to plaintiff's land on the main shore is not proven by the evidence." No other declarations of law was asked by either party, or given by the court. The ground upon which the court reached its conclusion is not left in doubt. Plaintiff's only claim of title to the land was that it was formed by accretions to his original tract. The finding of the court, as stated, involved this proposition of law: If the land in question was not formed by natural accretions to his land on the main shore, plaintiff could not recover. If this declaration announced a correct principle of law, and there was substantial evidence tending to prove that the land was not formed by natural accretions, the finding would be as conclusive, on appeal, as the verdict of a jury would have been. The evidence tended to prove that the land was formed against the bank of the river opposite lot 4 by reason of artificial dikes and other obstructions to the water between Duncan's Island and the main shore, and by filling the slough by the railroad company and the defendant city. The weight of the evidence was at least to the effect that neither the island nor slough, at the time the improvements were commenced, extended as far south as plaintiff's land. In view of the evidence, we must assume that the court distinguished between such accretions as are formed by obstructing the flow of the water or changing the current by artificial means and such as are formed without artificial interference with the banks or the natural flow of the water. The qualification made by the word "natural," as used in the finding, clearly indicates this distinction. We think the law makes no such distinction. The riparian owner is entitled to the land formed by gradual and imperceptible accretions from the water, regardless of the cause which produced it. This right he cannot be deprived of by the acts of others over whom he has no control, and for which he is in no way responsible. It was pertinently said by Mr. Justice Swayne, in St. Clair Co. v. Lovingston, 23 Wall. 66: "It is insisted by the learned counsel for the plaintiff in error that the accretion was formed wholly by obstructions placed in the river above, and hence that the rules upon the subject of alluvion do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The proximate cause was the deposit made by the water. Whether the flow of water was natural or affected by artificial means is immaterial." See, also, Halsey v. McCormick, 18 N. Y. 149; 3 Washb. Real Prop. 353. From the evidence and declaration of law given by the court it is evident that the court took a different view of the law, and we must hold that error was committed in using and applying the word "natural" to qualify the accretions to which plaintiff would be entitled.

3. The evidence showed very conclusively that Duncan's Island formed in the midst of the river many years ago, and for a time the navigable part of the river was between it and the main shore. The evidence also has some tendency to prove that the land now in dispute constituted a portion of the island, or was accretion to the island, rather than to the shore. If, on a new trial, either proposition should be proven true, then plaintiff could have no claim to it as accretion. These principles are well settled in this state. Benson v. Morrow, 61 Mo. 347; Buse v. Russell, 86 Mo. 211; Naylor v. Cox, 114 Mo. 232, 21 S. W. 589; Rees v. McDaniel, 115 Mo. 145, 21 S. W. 913; Cooley v. Golden, 117 Mo. 48, 23 S. W. 100.

4. Was the judgment for the right party, regardless of the error committed? Defendant, on the trial, read in evidence a paper signed by Mr. and Mrs. Lynch, dated in 1851, which by its terms gave, granted, and conveyed to the city of St. Louis the right to open certain named streets, and authorized the said city to locate and construct, on dry land held or claimed by them, a wharf 265 feet wide, according to designation on accompanying map, "to have and to hold the same, as the same is established in Ordinance No. 2596, for the use of a wharf, to be under the entire control and management of said city." This paper was duly signed by both Mr. and Mrs. Lynch, but was not sealed or acknowledged by either of them. By Ordinance No. 2596, approved March 29, 1851, a wharf from Plum street to the southern limits of the city was established. This wharf, as described in the writing and ordinance, would include a portion of the land in dispute. The written instrument, not having been acknowledged by Mrs. Lynch, is void as a release or dedication by her. The statute in force at that time gave her no power to convey her interest in land the legal estate of which she held, except by deed duly acknowledged. Hoskinson v. Adkins, 77 Mo. 538. Whether the instrument would operate as a license, as claimed, need not be considered, as it does not appear that the city has ever taken possession under it, and improved the property as a wharf. After 40 years of nonuse we may reasonably assume that the license, if one was given, has been revoked. Indeed, since the date of the alleged license it very conclusively appears from the evidence that plaintiff has made such use of the property as implies a revocation thereof. The evidence shows quite conclusively that the property was leased by plaintiff for a number of years subsequent to 1851, and was used by the lessee in a manner inconsistent with its use by the city as a wharf. The case of Moses v. Dock Co., 84 Mo. 244, is cited by counsel for defendant as sustaining his position that the instrument would operate as a license. It will be seen that, though in that case the same instrument was under review, it was legally

executed by the parties therein interested, and it was held that, inasmuch as the city took the undisputed possession of the property, through its lessees, there was a complete dedication. It was also declared as a fact, deduced from the evidence in that case, that "the property had at all times since 1859 been treated by all parties as a part of the wharf." There was no question in respect to an executory and unused license in that case. "A mere license may exist by parol, and ordinarily is not assignable, and is revocable unless it has been executed, and the party has incurred expense on the faith of it, so that he would be injured by the revocation of it." Baker v. Railroad Co., 57 Mo. 272, and cases cited.

5. It appears from the evidence that in 1855, in a proceeding for partition, that part of lot 4 lying between Columbus street and Front street was subdivided by commissioners into lots and streets. Front street was at the time the west boundary of the original city wharf. In 1859, Lynch and wife conveyed to Thomas Marshall certain lots assigned to them by the commissioners, which abutted on Front street. It is insisted now that this conveyance carried the title of the grantee to the river bank, and included the land in question, and therefore an outstanding title was shown to be in Marshall. A plat of the subdivision was filed by the commissioners with their report. This plat showed Front street as having a width of 140 feet, and a wharf adjoining and next the river, having a width of 125 feet. The certificate of the commissioners written upon the plat declares that Front street and the wharf "are opened for the sole and special use and benefit of the owners of the several lots fronting thereon, and are not declared or set apart as public highways, or for public use." The land in suit is included in the wharf as shown by the plat. A sale to Marshall was of designated lots. The eastern boundary of these lots was Front street, and the title of Marshall under his deed did not extend beyond this boundary. Ellinger v. Railway Co., 112 Mo. 526, 20 S. W. 800; City of St. Louis v. Missouri Pac. Ry. Co., 114 Mo. 22, 21 S. W. 202, and cases cited. Marshall, as the owner of these lots, has a mere easement in Front street and the wharf, but this right is no bar to an action of ejectment against a stranger. City of St. Louis v. Missouri Pac. Ry. Co., supra.

The question of adverse possession was not passed upon by the trial court, and we will not consider it here further than to say that the evidence did not show, as a matter of law, that defendant had been in possession of the land for a period sufficient to bar the action. Reversed and remanded. All concur.

PRICE et al. v. HALLETT.

(38 S. W. 451.)

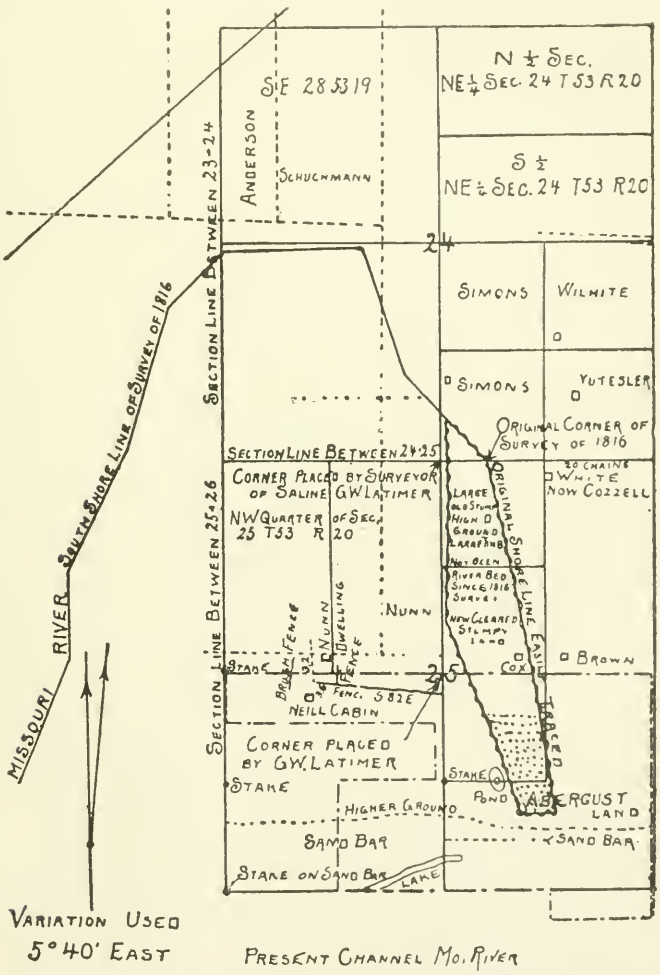
Supreme Court of Missouri, Division No. 2. Dec. 23, 1896.

Appeal from circuit court, Chariton county; O. F. Smith, Special Judge.

Ejectment by Emma Price and others against Daniel Hallett. There was judgment for defendant, and plaintiffs appeal. Affirmed.

This record presents another case growing out of the erratic action of the Missouri river. The land in controversy is claimed to be a part of a large tract which originally was attached to Saline county, on the south side of the river, but, by the action of the currents, has been transferred to the north bank, and attached to Chariton county. The process of transfer, plaintiff's claim, was complete in 1886. The particular portion of said land forming the basis of this action is the N. ½ of the N. ½ of the S. W. ¼ of section No. 25, township 53, range 20. If plaintiffs are right in their contention, this land was originally a part of "Horseshoe Bend," near New Frankfort, in Saline county, between Glasgow and Brunswick. This bend included in the government survey parts of sections 23, 24, 25, and 26, range 20. The E. ½ of section 25 was bounded by the river, and was fractional. The W. ½ was full. A plat of the original survey accompanies this opinion.

The evidence of plaintiffs tended to prove that the river began cutting away all the land on the west side of this bend many years ago, and in 1869 had cut away all of fractional section 26, and a large part of the W. ½ of section 25. In that year, the evi-



Neill cabin is 23 chains and 63 links west, and 3 chains and 63 links south of, centre of section 25 T. 53 R. 20; and in N. W. ¼ of S. W. ¼ of said section 25.

Nunn dwelling is 300 links north of line through centre of section 25 T. 53 R. 20. Nunn dwelling is the S. W. ¼ of the N. W. ¼ of said section 25, and very close to the east line thereof.

dence tends to show, one John Cassabeer was in possession of and claimed to own the remaining part of the N. ½ of the N. ½ of the S. W. ¼ of section 25. On the 1st day of September, 1869, Cassabeer and wife, by warranty deed, conveyed said last-named tract to Frederick Abrogast. Abrogast was already in possession of and claimed to own the fractional E. ½ of section 25, and some other tracts. He had a farm, with dwelling house and other farm buildings, and had a portion of it in cultivation. He continued in possession by himself and tenants until the most of his farm, including the 20 acres purchased of Cassabeer, was washed away by the river. Some time prior to 1878 the river had completely submerged the Cassabeer tract and all of the Abrogast farm, save about 30 acres, and a small strip of the original Horseshoe Bend. About this time the river cut through the bend on its south or Saline county side, and thereupon sand bars began to form anew the bend on its west side. For some time, however, a channel of the river ran around the north end of the bend; but gradually a large tract had formed to the west, and adjoining the bend, and the river ceased altogether to flow between the bend and the Chariton county shore. These alluvial formations soon became valuable cultivating land. The defendant and others squatted on these newly-made lands, and their claim thereto is based entirely on adverse possession, without paper title thereto. During the time Abrogast was in possession, to wit, on the 12th day of February, 1873, he executed a mortgage conveying said farm, including the Cassabeer tract or land in suit, to Saline county, to secure $1,000 borrowed from said county, and stipulated therein "that should default be made in the payment of the principal and interest, or any part thereof, at any time, it should all become due and payable according to the tenor and effect of the bond thereby secured," and the sheriff of Saline county was authorized, without suit, to proceed to sell the said mortgaged premises to satisfy said debt and interest thereon." Abrogast made default, and thereupon, on the 4th day of September, 1888, the county court of Saline county, by its order of record, found that said Abrogast was indebted to said county, for the use of said school funds, in the sum of $859.60, and that default had been made, and thereupon ordered that judgment be entered for said sum against Abrogast and his sureties, and made its order of sale of said property in said mortgage described to satisfy the sureties; and thereafter said order and judgment were duly certified to the sheriff of Saline county by the clerk of said court, and were delivered to said sheriff on the 6th day of September, 1888, commanding him to levy the same on said real estate, and to sell the same according to law, to satisfy said debt, interest, and costs; and thereupon said sheriff gave 20 days' notice of the time, terms, and place of sale and the real estate to be sold, in a newspaper published in Saline county; and in pursuance thereof, on the 19th day of October, 1891, by virtue of said execution and notice, sold said real estate at public vendue to the highest bidder, at the courthouse door in the city of Marshall, in said Saline county, during the session of the circuit court, and at said sale Alfred Rector became and was the highest and best bidder therefor, and the same was struck off and sold to him; and thereupon, said Rector having paid said bid, the sheriff executed, acknowledged, and delivered his sheriff's deed to said Rector. Afterwards said Rector sold and conveyed said real estate to Sterling Price, the husband of Emma Price, the plaintiff, and father of the other minor plaintiffs. On the 2d day of January, 1890, and during his lifetime, Price sold and conveyed one undivided fourth of said lands to plaintiff L. Benecke. The evidence tended to prove that Price took possession of the original Abrogast land thus acquired by him, had part of it cultivated, and pastured a part thereof, and continued in possession until the present controversy arose. After the land that had formed west of where the bend once was had become fit for cultivation, a number of persons settled upon different parts of it, principally north and west of the Abrogast land. These parties seem to have squatted upon the land, and made claims to it, without regard to section or other prior lines, but cut out their lines through the willows by common agreement among themselves. The defendant in this case bought the possession and right of one of these squatters, and, while he has pleaded no estoppel in pais, much evidence was heard in his behalf to establish such an estoppel against the plaintiff Benecke as to his claim for the undivided one-fourth. These squatters employed Mr. Carter, the county surveyor of Chariton county, to survey these lands for them, which he testifies he did from the original field notes, locating the land in Saline county. Neither Price nor his wife or children had anything to do with this survey, or any of the agreements of these squatters. The evidence tends to show that Frank Nunn was one of these original squatters, and his claim fell on the extreme eastern side of these newly-made lands, where the survey closed. Nunn sold to Hallett, the defendant in this case, and showed him 160 acres, of which Nunn claimed to own three-fourths, and Benecke one-fourth, which he said Benecke was to have for services to the squatters. Prior to the delivery of Nunn's deed to Hallett, a controversy arose about the description of the land. Nunn and Hallett went to Brunswick, to have Benecke write the deed; but, Benecke being absent, they went to Messrs. Hammond & Son, and undertook to give the description. This deed was left in Messrs. Hammonds' office, for Mr. Nunn to sign. Be-

fore it was signed, a mistake was discovered in it; and, at their request, Benecke prepared another deed, from a description prepared by the surveyor Carter, calling for 44 acres. This deed was executed October 16, 1890, and was left with Benecke to be recorded. Several months after the preparation of the deed, Nunn and Hallett went to Benecke's office to get the deed, and Hallett was then to pay for it. At that time, Hallett and Nunn claimed this deed had been changed since its execution so as to convey a less number of acres than as originally written. Benecke denied that any such change had been made. Hallett took this deed, conveying three-fourths of 44 acres, and says they had another deed prepared, but the only other deed in evidence is one executed by Nunn to Hallett, September 21, 1891, after this litigation had been commenced. Nunn, however, placed Hallett in possession under his purchase. The evidence also discloses that in the spring of 1888 one Neal settled on a part of this newly-made land, and built a cabin on the tract now in controversy. There is a conflict as to how he was there, whether in his own right or under Nunn. He claimed to be in his own right, and, after raising a crop, sold his cabin and claim to Price and Benecke, and made them a deed. In the spring of 1891, Price and Benecke leased the S. W. ¼ of section 25, township 53, range 20, which includes the land in suit and the Neal cabin, to Jenkins and Sullivan, by written lease, of date February 14, 1891. Jenkins and Sullivan repaired the Neal cabin, and moved into it. About this time, defendant Hallett moved to the Nunn tract. Hallett got possession of the cabin from Jenkins and Sullivan, and Price and Benecke began a suit of forcible entry and detainer. That suit was sent to the circuit court of Chariton county, and, by change of venue, was sent to the circuit court of Callaway county, and was still pending when this case was tried, in Chariton county. Sterling Price died after the trial of the forcible entry case before the justice of the peace. This action of ejectment was commenced by his heirs and L. Benecke against Hallett, was tried in 1893, and resulted in a judgment for defendant from which plaintiffs appeal. The jury having found the issue of fact for defendant, the appellants insist that their verdict was induced by erroneous and contradictory instructions. The propriety of the verdict must be determined by an examination and comparison of these declarations of law.

A. W. Mullins, L. Benecke, and C. Hammond & Son, for appellants. Tyson S. Dines and Crawley & Son, for respondent.

GANTT, P. J. (after stating the facts). 1. The first assignment is that the first instruction for defendant is wrong and misleading, in that it instructs the jury that plaintiffs failed to show any title whatever to the land in controversy, and is in conflict with plaintiffs' second instruction. Said instruction numbered 1, for defendant, was in these words: "The court instructs the jury that it appears from the evidence in the case that the patent for the north half of the southwest quarter of section 25, township 53, range 20, in Saline county, Missouri, was issued by the government of the United States to one Jonathan Millsaps, and that plaintiffs in this case have entirely failed to show that the title so granted by the government to said Millsaps was ever conveyed to the plaintiffs, or any of them, or to any person under or through whom said plaintiffs claim." The second instruction for plaintiffs was as follows: "If the jury find from the evidence that the tract of land in controversy, to wit, the north half of the north half of the southwest quarter of section 25, township 53, range 20, was conveyed to Fred Abrogast, in the year 1859, by John Cassabeer, and that said tract became and was part of an entire tract of land known as the 'Abrogast Farm,' and described as the southeast fractional quarter, the southeast quarter of the northwest quarter of section 25, township 53, range 20, and that said Abrogast, by himself and his tenants, was in the actual possession of said farm, claiming and holding the same as his own, adversely to all other claimants, and continued in the actual, open, notorious possession of the same for ten years after the date of said conveyance by said John Cassabeer, then the title became vested absolutely in said Abrogast; and if the jury further find from the evidence that, by the encroachments of the Missouri river upon said land, described above as the 'Abrogast Farm,' while it was held and owned by said Abrogast or his grantees, a portion of said land, formerly including the land in controversy, was washed away, but that a portion of said farm remains unaffected by the action of the waters of said river, and that afterwards, by the natural action of the waters of said river, the land in controversy has been reformed as originally located, and also has been deposited at and against the Abrogast land remaining, and not washed away by the river, then said Abrogast and his grantees became and are the owners of said land." We are not able to concur in either of the criticisms of the first instruction given for defendant. In our judgment, it simply tells the jury that the plaintiffs failed to deduce a paper title to the land from the original patentee, Millsaps; and it was a fact that they had failed in so doing. It nowhere tells them that plaintiffs might not have acquired a title thereto by purchasing the possessory right, which had ripened into a title in Abrogast. Had the two instructions been connected with the disjunctive "but," any supposed inconsistency would have vanished at a glance. Taken together, the court simply instructed the jury that plaintiffs had not shown a paper

title through Millsaps, the original patentee, but that was not essential to their recovery, if they found that Abrogast entered the land under claim of title, through his deed from Cassabeer, and had held the open, notorious, adverse possession thereof for 10 years; that such possession would authorize them to recover.

2. It is next urged that there is no evidence whatever upon which to base defendant's second instruction, which was in these words: "Before plaintiffs can recover upon the ground of a prior possession of the land sued for, or any part of said land, plaintiffs must not only prove the fact of such prior possession, but must also prove to your satisfaction that such prior possession was exclusive and adverse to the possession relied upon by the defendant in this case; and, if you believe that such prior possession relied upon by plaintiffs was not exclusive and adverse to the defendant, and those under whom he claims, then such prior possession of plaintiffs cuts no figure in this case, and you must find for the defendant." It is objected that there was no evidence upon which to base this instruction, but it seems to us that this is a misconception of its purpose. Is it not, rather, a declaration of what facts plaintiffs were bound to prove in order to recover, rather than any assumption of what defendant had shown? Defendant unquestionably had a possession for several years, and the burden, in the very nature of the case, was upon plaintiffs, in the absence of a paper title, to show title by possession of the specific tract in suit. We can discover no legal objection to this instruction.

3. The third instruction for defendant is also challenged. It is as follows: "If, from the evidence, you believe that on the 10th day of September, 1890, the defendant Daniel Hallett and one Frank Nunn concluded negotiations whereby said Nunn agreed to convey to Hallett 120 acres of land, including the land in controversy, at the agreed price of $275; and that said 120 acres was part of the 160 acres, of which plaintiff Louis Benecke owned at that time an undivided one-fourth; and if you further find that said parties undertook to carry out said agreement, and to consummate said sale and conveyance on that day, with the knowledge and acquiescence of plaintiff Louis Benecke; and that it was the intention and purpose of said Frank Nunn to convey all his interest and claim in and to said 120 acres to said Hallett by the deed that day written by plaintiff Louis Benecke; and that said Benecke knew and acquiesced in the said intended conveyance; and that said Hallett paid $275, and accepted the deed so written, believing at the time that it did, in fact, convey all of Nunn's interest in and to the 120 acres of land; and if you further believe that said Hallett afterwards took possession of said 120 acres of land under his said purchase from Nunn, and continued in possession thereof until the commencement of this suit,—then the court declares the law to be that said Louis Benecke is estopped and precluded from maintaining this action against said Hallett, no matter whether the deed written by him for Frank Nunn on said 10th day of September, 1893, actually and correctly described said land or not." The theory of this instruction is that Benecke, one of plaintiffs, is estopped. The objection is now made that this instruction should not have been given, because no such estoppel in pais was pleaded. It has often been decided by this court that estoppel in pais must be pleaded. Bray v. Marshall, 75 Mo. 327; Noble v. Blount, 77 Mo. 235; Avery v. Railroad Co., 113 Mo. 561, 21 S. W. 90. It was so held on an objection to testimony in Bray v. Marshall, supra. In Noble v. Blount it was said there was neither a pleading nor evidence to justify such an instruction. It seems to us this doctrine has peculiar weight when invoked against the admissibility of evidence when no issue of estoppel has been tendered in the pleadings, or when an estoppel in pais is urged for the first time in this court; but where parties have permitted an issue of this kind to be raised by the evidence without objection, and have had full opportunity to try the issue, we are unable to draw a distinction between such a case and those cases in this state in which parties have neglected to file replies; and this court has held that it was too late, after trying the case as if a reply had been filed, to claim that the answer was admitted. Had a timely objection been made when this evidence tending to show an estoppel was offered as against Mr. Benecke, it would have been excluded, or the court would have permitted an amendment pleading such estoppel; but no such objection appears to have been made at that time, and now that the evidence has been heard, and the instruction given upon it, we think it is too late to raise the question of pleading on that point. We shall treat the record now as if the amendment had been prayed and permitted. Baker v. Railway Co., 122 Mo. 533, 26 S. W. 20; Darrier v. Darrier, 58 Mo. 222. It has been held in New York, under the Code, that, where an amendment to a pleading might have been ordered by the court on trial, it may even be amended on appeal, so as to conform to the proofs. Hudson v. Swan, 7 Abb. N. C. 324; Bate v. Graham, 11 N. Y. 237.

Was there substantial evidence tending to prove an estoppel against plaintiff Benecke? We think there was. Of course, its credibility was for the jury; but, if credited by them, it tends strongly to show that Mr. Benecke was silent when he should have spoken. If Nunn and Hallett are to be believed, they went to Mr. Benecke, to draw the deed from Nunn to Hallett; that Nunn said Benecke was to receive an undivided one-fourth for his fee for sustaining their title, and that the deed was to convey 160 acres of land, and Benecke agreed to take the "L" 40 of the tract, and offered to sell his share that day to Hallett; that he made no claim of title or ownership from any other source; and that they traded with this under-

standing. Even if these semiamphibious squatters, who were evidently illiterate, were mistaken about the number of acres described by the deed, still there was no claim by Benecke of a title other than that he was to receive from these same squatters for serving them. Surely, he cannot be heard, after remaining silent, without asserting a claim at that time, now to urge another claim which he then had. We do not think the court erred in giving the instruction on estoppel.

4. Finally, it is urged that all the evidence went to show this was the Abrogast land. Whether this land was the N. ½ of the N. ½ of the S. W. ¼ of section 25, township 53, range 20, was a question of fact. The surveyor of Chariton county undertook to survey it as a part of Chariton county, according to Saline county surveys. According to the Chariton county survey, there is now land corresponding to the description given in the petition. There was no such section as section 25, township 53, range 20, on the north side of the river. The surveyor of Chariton county says the government never surveyed the bed of the river. He says this land is evidently all "made land." It shows plainly that the river once ran where it now is. Now, if plaintiffs had title to this land, which all the evidence shows was once entirely washed away, and the river ran where the land now is, it vested in them solely as an accretion to that portion of the Abrogast farm which never washed away. Unless it was formed to such tract as an accretion, plaintiffs have no title thereto. The mere fact that it now forms a tract within lines that once inclosed the original Cassabeer tract will not give title. Hahn v. Dawson (Mo. Sup.) 36 S. W. 233.

The question of accretion was submitted to the jury in a most favorable instruction, and the jury found against plaintiffs, and the circuit court approved the finding. We cannot say that there was such a clear case of accretion that the verdict was against the evidence. Whether this land was first formed as a sand bar, and, by receding waters, became attached, or whether it was formed by gradual accretion, we confess, is by no means clear to us. Whether it first formed to the Chariton shore, or to the remnant of the old bend, we think, is very uncertain, and hence we accept the verdict of the jury.

The judgment is affirmed.

BURGESS and SHERWOOD, JJ., concur.

IVES v. ALLYN.

(13 Vt. 629.)

Supreme Court of Vermont. Orleans. March, 1841.

Ejectment, to recover the seizin and possession of lot No. 68, in Charleston. Plea, not guilty, and issue to the country. On the trial in the county court, the plaintiff, to show title in his grantor to the land in question, offered in evidence certified copies of the last wills and testaments of Christopher Olney and Sally Ann Olney. It appeared that the original wills were duly proved, approved and allowed in the municipal court of the city of Providence, in the state of Rhode Island, (a court having probate jurisdiction) and that copies thereof, duly certified, after due notice had been given, were filed and recorded in the probate court for the district of Orleans, (in which district the land in question lies,) on the 22d day of June, 1840, agreeably to the statute of this state. The present action was commenced previous to the filing and recording of said copies in the probate court for the district of Orleans. The defendant objected to the admission of said copies, but the county court overruled the objection, and they were read to the jury. The plaintiff also read in evidence a deed from Wm. C. Bowen, heir to the devisee of Sally Ann Olney, conveying all the said Bowen's lands in Vermont to the plaintiff, which was objected to by the defendant, but admitted by the court. The plaintiff also offered the deposition of Mary Olney, to which the defendant objected; but the objection was overruled and the deposition admitted. *The jury returned *630 a verdict for the plaintiff, and the defendant excepted. The only question in this case decided by this court, at the present term, related to the filing and recording of the copies of said wills in the probate court for the district of Orleans. It therefore becomes unnecessary to state the substance of said wills, and other papers made parts of the case. This case was before this court at the last term, and in the report of the case, as then decided, (see 12 Vt. R. 589,) the substance of said wills, deed and deposition are fully stated. A question was made whether the lands devised by Christopher and Sally Ann Olney included the land sought to be recovered in this action. That question, having been passed upon by the jury, was not considered subject to revision in this court.

J. Cooper, argued for defendant, and

E. Paddock, for plaintiff.

The opinion of the court was delivered by

REDFIELD, J. No questions are reserved in this case except those which arise upon the face of the papers introduced by the plaintiff, for the purpose of showing title to the premises demanded. The only question, therefore, which the court have deemed it necessary to decide is, how far the devises, upon which the plaintiff relies, can avail him. They were never filed and recorded in any probate office in this state, until since the bringing of this suit. At the last term of this court, in the same case, it was decided, that the probate of the wills in the state of Rhode Island could not avail the plaintiff in this state. Since that time the requisite probate has been made in this state.

It is true that the plaintiff must recover upon his title, as it existed at the time of bringing suit, but the recording of deeds, necessary to their being read, may be done at any time before the trial. When the deed is recorded, it takes effect from the delivery. So in this case, it is the death of the devisor that vests the title. At common law, no probate of a devise or will, disposing of real estate, was required, or was of any avail. In this state such probate is indispensable, as the probate court have exclusive jurisdiction of the proof *of *631 wills, of real as well as personal estate. But this is mere matter of evidence, and if done at any time before the trial, the devise takes effect from the death of the devisor.

The question, whether the land named in the devise is the same land sued for, was one of fact for the jury, and not subject to revision here.

Judgment affirmed.

Ex parte FULLER.

(Fed. Cas. No. 5,147, 2 Story, 327.)

Circuit Court, D. Massachusetts. May Term, 1842.

This case came up in the district court [case unreported] on a petition by the assignee [Henry W. Fuller] for leave to sell one undivided half part of certain real estate in Portland, Maine, which was devised to Andrew Ross, a bankrupt, and his sister; and which was referred to in the original petition of the bankrupt, as follows: "David Ross, of Portland, Maine, grand-father of your petitioner, died at Portland, Me., the latter part of December, 1841, and your petitioner has reason to believe he may, by his wife, have bequeathed to him and his sister, a certain piece of property in Portland. The instrument purporting to be his last will and testament has not been presented for probate, and of course has not been proved, approved and allowed." Andrew Ross filed his petition to be declared a bankrupt on February 8th, 1842, and was declared a bankrupt on March 22d, 1842. David Ross, the grand-father of Andrew, died December 29, 1841, testate. His will was presented and filed for probate at Portland, March 15, 1842, and was proved, approved, and allowed, April 19, 1842. Andrew Ross, who was named in the will as one of the executors, upon being informed of the fact, declined accepting that office, and David Ross, Jun., the other executor, was appointed and qualified as executor. By the will, the estate in question was devised unconditionally and in fee, to Andrew Ross and his sister. The will was not filed for probate until after the filing of Andrew Ross's petition to be declared a bankrupt; and was not proved and allowed, until after he was declared a bankrupt. Andrew Ross, living in Boston, had nothing to do with his grandfather's estate, and did no act accepting or declining the devise. Upon this statement of facts, the following question was ordered by the district court to be adjourned into this court, namely: "Whether, upon the foregoing facts, the said real estate, devised as aforesaid to Andrew Ross, is the property of the said assignee, so that he may sell and convey the same as a part of the estate of the said Ross."

H. W. Fuller, as assignee.

Mr. Rogers, for the bankrupt.

STORY, Circuit Justice. Two questions arising upon the statement of facts are submitted to this court for decision. 1. In the first place, when upon the principles of the common law, does a devise of real estate take effect in the state of Maine? 2. Is it from the date of the probate of the will, or from the death of the testator, and as connected with this, whether any assent to the devise is required before the estate vests in the devisee? Now, upon this question, I cannot say that I feel any doubt. The probate courts of Maine (like the probate courts of many other states in the Union) have original and exclusive jurisdiction over wills of real estate, as well as of personal estate; and the decision of the proper probate court, original or appellate, as to approval or disapproval of such wills, is final and conclusive as to the validity thereof, and cannot be questioned or reëxamined in any other tribunal. In short, our probate courts generally possess the same exclusive jurisdiction over the probate of wills of real estate, that the ecclesiastical courts of England exercised over wills of personalty. This is admitted on all sides; and, indeed, is now too firmly established to admit of juridical controversy.

Now, as soon as a will of real estate, or personal estate, is admitted to probate, and approved, I take it to be clear, upon the principles of the common law, that the probate relates back to the death of the testator, and affirms and fixes the title of the devisee thereto, from that period. This would seem a necessary result; for no title can pass by descent or distribution to the heirs or next of kin of the testator, since the whole is disposed of by his will; and the title cannot be in abeyance, or in nubibus, at least, in contemplation of law. Thus, in every trial at the common law, involving a title by devise, if the devisee assents thereto, the title is in him from the death of the testator, by mere operation of law, if the will is established by the verdict of the jury; although the trial may not occur, until many years after the death of the testator. The like rule applies to the probate of wills of personalty in the ecclesiastical courts, where the title of the legatees, and of the executor, takes effect by relation from the death of the testator. It is wholly unnecessary to cite authorities upon such a point. But, if it were necessary, Co. Litt. 111b, is directly in point, where Lord Coke says, that, "In case of a devise by will of lands, whereof the devisor is seized in fee, the feehold, or interest in law, is in the devisee before he doth enter: and in that case, nothing, having regard to the estate or interest devised, descendeth to the heir." The same doctrine was firmly established in Massachusetts (from which Maine derives its jurisprudence) long before my time; and it is fully recognized in the case of Spring v. Parkman, 3 Fairf. [12 Me.] 127. The case of Shumway v. Holbrook, 1 Pick. 114, proceeds upon the admission of the like doctrine, and shows that no title can be proved to land by devise, in a court of common law, until the will has been proved in the proper court of probate.

As to the other point, there is no doubt that the devisee must consent, otherwise the title does not vest in him. But where the

estate is devised absolutely, and without any trust or incumbrances, the law will presume it to be accepted by the devisee, because it is for his benefit; and some solemn, notorious act is required, to establish his renunciation or disclaimer of it. Until that is done, "Stabit presumptio pro veritate." That is sufficiently shown by the case of Townson v. Tickell, 3 Barn. & Ald. 31, cited at the bar, and the still later case of Doe d. Smyth v. Smyth, 6 Barn. & C. 112. Brown v. Wood, 17 Mass. 68, and Ward v. Fuller, 15 Pick. 185, manifestly proceeded upon the same foundation.

Now, in the present case, there is no pretence to say, that Ross has ever renounced or disclaimed the estate devised to him. The statement of facts is, that he has done no act accepting or declining the devise. If so, then the presumption of law is, that he has, by implication, accepted it, since it gives him an unconditional fee. But I think, that the very formulary, in which he has inserted a reference to it in the schedule of his estate is decisive to show that he intended to accept whatever estate should be devised to him by his grandfather's will. Until he filed his petition in bankruptcy, the presumption of his acceptance is irresistible; for it was clearly for his benefit; and after he had done so, I am of opinion, that he had no right to disclaim or renounce it. It would be a fraud upon his creditors; and a court of equity would compel him to do all acts necessary to perfect his title to the devised estate; and if he did not, no court of bankruptcy would decree him a certificate of discharge. The bankrupt act of 1841, c. 9, § 3 [5 Stat. 440], vests "all the property and rights of property, of every name and nature," of the bankrupt, by mere operation of law, in his assignee, upon the decree of bankruptcy. Nothing can be clearer, than that, at the time of his bankruptcy, the devise in the present case was a right of property vested in Ross. The law presumed his acceptance, until the contrary should be shown. His title could be devested only by his renunciation and disclaimer of the devise before that time; and the subsequent probate of the will, by relation, made the title complete in the assignee. If Ross's consent had been necessary to make it complete, he was bound formally to give it; and he may even be compelled to give it, by a court of equity. The right of property was inchoate, if it was not consummated, in the assignee from the moment of the decree in bankruptcy; and no subsequent act of the bankrupt could change it.

It has been suggested, that the devise was not beneficial to Ross, and therefore no presumption can arise of his acceptance of it. How that can be well made out, I do not perceive. Before his bankruptcy, it was clearly for his benefit; and that event has not changed the nature of the interest, but merely the mode of appropriating it. His own voluntary act has enabled his creditors to have the benefit of it. As an honest debtor, he must desire, that his creditors should derive as much benefit from all his "rights of property," as is possible. It would be a fraud on his part to withdraw any fund from their reach by a disclaimer or renunciation; and it ought to deprive him of a certificate of discharge. It is, therefore, clearly now for his benefit to presume his acceptance of the devise; rather than to presume him willing to aid in the perpetration of a fraud.

If this, be the true posture of the case, standing upon the general principles of the common law, the remaining question is, whether the Revised Statutes of Maine, of 1840, c. 92, § 25, have made any alteration in the operation of the common law, as to the probate of wills. The 25th section declares; "No will shall be effectual to pass real or personal estate, unless it shall have been duly proved and allowed in the probate court; and the probate of such will shall be conclusive as to the due execution thereof." The argument is, that under this clause, a will is a mere nullity before probate; that the probate gives it life and effect from that time, and not retroactively. It appears to me that this section is merely affirmative of the law, as it antecedently stood. The will before probate, is, in no just juridical sense, a nullity. The very language of the section prohibits such an interpretation. The will must still be the foundation of the whole title, inchoate and imperfect, if you please, until its validity is ascertained by the probate, but still a will, and not a nullity. It would be an anomaly in the use of language, to speak of the probate of a nullity. The probate ascertains nothing, but the original validity of the will as such. The fact of the testator gave it life; his death consummated the title, derivatively from himself; and the probate only ascertains that the instrument in fact is what it purports on its face to be. It might as well be said that a will of real estate, at the common law, is a nullity, until a jury has ascertained its validity; whereas the verdict ascertains only the fact that the title under the will is perfect, because it was duly executed by a competent testator, and therefore took effect by relation from the time of his death.

But if the argument itself were well founded, it would not warrant the inference attempted to be drawn from it. By the probate, when granted, the will, under the section, takes effect by relation back from the death of the testator. It recognises and vests the title in the devisee from that moment. It would otherwise happen, that if he should die before the probate, having accepted of the devise, no title could vest in him; but the bounty of the testator would be defeated. Such a construction of the section would be productive of the grossest

mischiefs; and there is not a word in the section, which authorizes, or even countenances it. The section only provides, that no will shall be effectual to pass real estate, unless it shall have been duly proved; not, until it shall have been duly proved. When proved, it is to all intents and purposes a will; and it is to operate upon the interests of the testator, when he intended, that is, from the time of his death.

Upon the whole, my opinion is, that the question propounded by the district court, ought to be answered in the affirmative; and I shall direct a certificate accordingly.

CARMICHAEL v. LATHROP et al.
(66 N. W. 350.)

Supreme Court of Michigan. Feb. 26, 1896.

Appeal from circuit court, Wayne county, in chancery; Joseph W. Donovan, Judge.

Action by Marilla B. Carmichael against Ada M. Lathrop and Emily B. Lloyd. Decree for defendants, and plaintiff appeals. Reversed.

Fraser & Gates, for appellant. Charles A. Kent, for appellees.

HOOKER, J. The will of Henry P. Pulling was executed in June, 1872. After giving his wife the use and enjoyment of all of his property during life, in lieu of dower, it provided that: "Second. All the remainder of the estate of, in, and to my said property, both real and personal, subject to the said life estate of my said wife, I give, devise, and bequeath to my three daughters, Ada M. Lathrop, of Detroit, Michigan, Emily Lloyd, of Albany, New York, and Marilla B. Carmichael, of Amsterdam, New York, and to their heirs forever, share and share alike. * * * Third. I hereby authorize and empower my hereinafter named executors to sell and convey in fee simple absolute, in their discretion, any portion or all of my real estate, with a view of otherwise investing the proceeds thereof, or to change my present securities into real investments. But such change is to be done with the consent of my wife, and the approval of the probate court or a court of chancery. And this power and authority of so selling and conveying in fee simple absolute my real estate is hereby made notwithstanding the bequests which are given to my daughters, which bequests are hereby made subservient to said power. And I do hereby direct my executors to invest all my moneys and property, and the avails of all real estate so sold, in first-class, unincumbered real-estate mortgages, or in United States bonds or Michigan state bonds, said securities to be held and retained by them, and the income thereof paid quarter yearly, or, at the furthest, every half year, by them, to my said wife, until her decease, and on such death my estate is to be closed up and distributed as provided for in the second clause of this my will. And lastly I do hereby appoint my brother Abraham C. Pulling, of New York City, my brother-in-law William P. Bridgman, of Detroit, and my son-in-law Joseph Lathrop, of Detroit, to be the executors of this my last will and testament, hereby revoking all former wills by me made." Mr. Pulling died in July, 1890, and the will was probated August 19, 1890. Joseph Lathrop qualified as executor. The probate records show that at the time of the testator's death he was seised in fee of real estate to the value of $65,000, that there was due to him upon land contracts $45,000, that he owned other personal property to the amount of $30,000, and that there were no debts or claims against the estate. Previous to the death of the testator, he conveyed to each of the defendants a parcel of real estate; that conveyed to Mrs. Lloyd being alleged to be worth $14,000, and that received by Mrs. Lathrop said to be worth $10,000. There is evidence tending to show that he intended to repair the house upon Mrs. Lathrop's property, thereby making the gift to her equal to that of Mrs. Lloyd, and that he intended to do as well by his other daughter, the complainant; but her husband became embarrassed, and finally went to state's prison, and she never received a home, as the others had. Her father, however, gave to her money from time to time, for her support, which aggregated $1,100. Soon after the probate of the will, litigation arose between the widow and children, which was finally adjusted, and the property was divided, the parties executing the necessary deeds and other instruments to carry it into effect. The accounts of Lathrop, the executor, were settled, and he was discharged. There is now some land held in common by the three sisters.

The complainant files the bill in this cause, alleging that the lands conveyed by the testator to her two sisters should be treated as ademptions of their respective legacies, and that they should be required to account to her for her share thereof. She alleges that her father so intended, and that they recognized the justice thereof, and promised to see that she received the same, and, relying upon such promises, she consented to the settlement of the estate, expecting that her sisters would pay her an amount equal to her share of said parcels so received by them. It seems tacitly agreed that this record involves only the question whether the property conveyed to Mrs. Lloyd and Mrs. Lathrop before the testator's death should be applied upon their respective interests under the will, or, in other words, as the counsel for the complainant state it, whether it can be treated as ademption or a satisfaction pro tanto of their bequests. We are perhaps at liberty to assume from the pleadings and admitted facts that the defendants received sufficient personal property under the will to more than cover the claim of the complainant; in other words, that they have received bequests to such amount in addition to any lands that they may have received. As to such personal property, the will made the sisters legatees, although they may have been also devisees as to the real estate, if the contention of the defendants' counsel is correct. In other words, they are none the less legatees, taking bequests of personal property, because one and the same provision of the will gave them both personal and real property. Hence we need spend no time upon the question whether the terms of the will made them devisees, as there are legacies sufficient to support the ademption

contended for. We can therefore eliminate some of the questions which arise where an attempt is made to apply the doctrine of satisfaction to a devise of real property by reason of the conveyance to the devisee of other property. The case is one where it is claimed that a gift of personal property by will may be satisfied by a conveyance of land, when such is the clear intention of the testator. If a person should bequeath to another a sum of money, and, previous to his (the testator's) death, should pay to such person the same amount, upon the express understanding that it was to discharge the bequest, the legacy would be thereby adeemed. But, in the absence of an apparent or expressed intention, that would not ordinarily be the effect of the payment of a sum of money to a legatee under an existing will. Generally, such payment would not affect the legacy. To this rule there is an exception, where the testator is a parent of or stands to the legatee in loco parentis. In such case the payment would be presumed to be an ademption of the legacy. At first blush this impresses one as an unreasonable rule, as it puts the stranger legatee upon a better footing than the testator's own son, and judges and law-writers have severely condemned the rule. See Story, Eq. Jur. §§ 1110–1113. It has been said that "this rule has excited the regret and censure of more than one eminent modern judge, although it has met with approbation from other high authorities." Williams, Ex'rs, 1332. Story's condemnation of it is strong, but he adds, "We must be content to declare it a lex scripta est. It is established, though it may not be entirely approved." And Worden, J., in Weston v. Johnson, 48 Ind. 5, says, "Whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence." Shudal v. Jekyll, 2 Atk. 518; 2 White & T. Lead. Cas. Eq. (4th Ed.) 741; Van Houten v. Post, 33 N. J. Eq. 344; Ex parte Pye, 18 Ves. 140. With a refinement of logic, characteristic, the early English judges held that the intention to adeem a legacy is to be presumed from the advancement of a part of the legacy, on the theory that it was the testator's right to do so, and that he must be presumed to be the best judge of the propriety of a revocation; but the rigor of this rule has been relaxed, and cannot now be said to be the law. Ex parte Pye, 18 Ves. 140; Pym v. Lockyer, 5 Mylne & C. 29, 55; Montague v. Montague, 15 Beav. 565; Williams, Ex'rs, 1333; Hopwood v. Hopwood, 7 H. L. Cas. 728; Wallace v. Du Bois, 65 Md. 153, 159, 4 Atl. 402. See cases cited 1 Pom. Eq. Jur. § 555, note 3. There are cogent reasons in support of the rule stated,—i. e. that payment to a son adeems the legacy,—which is based on the theory that such legacy is to be considered as a portion, and that the father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one, oftentimes the least worthy. Double portions were considered inequitable, and upon this the doctrine rests. Suisse v. Lowther, 2 Hare, 427. While the authorities are a unit that a legacy by one in loco parentis will be adeemed by payment, in the absence of an apparent or expressed intent to the contrary, the doctrine was early restricted. Among other limitations was the rule that the presumption could not be applied to a residuary bequest, because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed. Freemantle v. Bankes, 5 Ves. 85; Clendening v. Clymer, 17 Ind. 155; Story, Eq. Jur. § 1115. This exception fell with the discarding of the rule that satisfaction must be in full. Pym v. Lockyer, 5 Mylne & C. 29; Montefiore v. Guedella, 1 De Gex, F. & J. 93. Again, it was held that it could not be applied unless the advancement was ejusdem generis with the legacy. See 2 Story, Eq. Jur. § 1109. Counsel for the defendant contend that "the conveyance of real estate after the making of a will is held not a satisfaction of any legacy, in whole or in part, even though that was the clear intent of the testator," and he cites several authorities to sustain the proposition. In Arthur v. Arthur, 10 Barb. 9, it was held that "a conveyance made subsequent to a devise of land is not a revocation or satisfaction of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, that is a revocation pro tanto." This was a case where the court found that the grantor intended and the grantee expected the land conveyed would be in lieu of the grantee's share under the will. It was said that to hold that the conveyance was a satisfaction was to hold that the will might be revoked by implication, which could not be tolerated under the statute of frauds. This case contains an elaborate discussion of the subject, and cites many of the earlier authorities bearing upon it. The court of appeals considered the subject in Burnham v. Comfort, 108 N. Y. 535, 15 N. E. 710. In this case it was claimed that a devise of real property was satisfied by the payment of money, on the express understanding, evidenced by the receipt of the devisee, that it was received as a part of her father's estate. The court said that to sustain such claim they must hold that it operated as a revocation of the will, which would contravene "the spirit, if not the letter" of the statute of frauds, and that the proposition "lacked support in principle as well as authority." The opinion then asserts that "the rule of ademption is predicable of legacies of personal estate, and not applicable to devises of realty." After

discussing the question of intention, and intimating that, while a presumption of intention that the gift should be in satisfaction would exist if the case were one involving a legacy, it would not in case of a devise, it proceeds to show that the statute of frauds, which extends to wills, was an unsurmountable barrier to the application of the rule contended for, as to devises. Two members of the court dissented. The supreme court of South Carolina, in the case of Allen v. Allen, 13 S. C. 512, had occasion to consider a case where the legatees were also devisees, as in the present case. It was held that payments of money were to be considered as made in satisfaction of the legacies, but not the devises. The court said: "It would seem that, upon the same principles, devises of real estate ought likewise to be adeemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisees with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate, and, in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator, and disturb the distribution of his property which he thought was proper and just to his descendants. For, while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given where it is in conflict with the rules of law. A devise of real estate cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until it is revoked or altered in the manner prescribed by law." Attention is also called to the case of Swails v. Swails, 98 Ind. 511. In this case land was devised as follows: 88 acres to J.; 36 acres to N. Subsequently the testator conveyed portions of the same land as follows, viz.: 60 acres to J., the son; and 40 acres to N., a grandson. It was held that the deeds did not revoke the devise of the 24 acres to N., and that the doctrine of ademption does not apply to specific devises of real estate, nor where the devisor does not stand in loco parentis. The case followed Weston v. Johnson, 48 Ind. 1, where it was held that the doctrine of ademption of legacies by advancement to the legatee by the testator in his lifetime has no application to devises of real estate. Again, in Campbell v. Martin, 87 Ind. 577, it is said, "But we know of no reason whatever for the extension of the doctrine, and making it applicable to devises of real estate." In Marshall v. Rench, 3 Del. Ch. 239, the court admits that in some cases a conveyance to a devisee after the making of the will would operate in like manner as the ademption of a legacy,—e. g. where the conveyance to the devisee is of the same land,—because "by such a conveyance the testator executes his devise, precisely as the settlement of a portion on a legatee is an ademption of the legacy." The court adds that "the conveyance to a devisee of lands other than those devised, or of an interest in lands different from that devised, has never been held an implied revocation of the devise." The authorities cited in support of this are all ancient, except Arthur v. Arthur, hereiubefore discussed. We mention at this point the fact that all of these were cases where the attack was made upon a devise, merely, except the South Carolina case, and in that case the claim of ademption was sustained as to the legacies. 2 Woerner, Adm'n, p. 978, is cited in support of defendants' contention. This author dismisses the subject with the statement that "specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion. And, for the same reason, real estate devised is held not to come within the rule; but this exception is repudiated in Virginia, and unfavorably commented on elsewhere." See Hansbrough v. Hooe, 12 Leigh, 316.

The authorities cited have been commented on at length for the purpose of showing that they differ from the case before us, inasmuch as they were cases where it was sought to treat conveyances as satisfactions of devises. This is not a case where an attempt is made to deprive a devisee of title to land willed to him, but it is claimed that the presumption that a bequest to a son is satisfied pro tanto by a gift is not to be applied where the gift is of land instead of money, or other personal property ejusdem generis. In Richards v. Humphreys, 15 Pick. 140, will be found the following dictum of Shaw, C. J.: "We have seen that ademption depends solely upon the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. Had he purchased a house or other property in her name, and for her benefit, with the like intent and purpose expressed, it would have had the same effect." It is apparent that the law looks upon a legacy to a son as a setting off of his portion. Also, it is plain that a subsequent gift, unless it be of real estate, is presumed to be in satisfaction pro tanto of the legacy. It is also settled that whether the gift is to be considered an ademption of a legacy must depend upon the intent of the testator alone. A gift of personal property to a son may be shown not to have been so intended, but the burden is upon the legatee. Ford v. Tynte, 2 Hem. & M. 324. A gift to

a stranger may be shown to have been intended as an ademption, but here the presumption is the other way, the burden being upon the administrator to show such intent. There can be no doubt that a testator's conveyance of real property may constitute an ademption, if he so intends it, e. g. where he expresses the intent in the conveyance, and possibly in other ways. If so, the only significance of the doctrine ejusdem generis is its effect upon the presumption. The doctrine that the property conveyed must be ejusdem generis appears to be the only ground upon which it can be said that the conveyance in this case should not be treated as satisfaction pro tanto. It has been said in early cases that "when the gift by will and the portion are not ejusdem generis, the presumption will be repelled. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land." Bellasis v. Uthwatt, 1 Atk. 428; Goodfellow v. Burchett, 2 Vern. 298; Ray v. Stanhope, 2 Ch. R. 159; Saville v. Saville, 2 Atk. 458; Grave v. Earl of Salisbury, 1 Brown, Ch. 425. But see Bengough v. Walker, 15 Ves. 507. The courts have not accepted without protest the proposition that the application of the presumption arising from the relation of parent and child should depend upon the similarity of the property willed and donated, and it has been asked "why, if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of lands of equal value." And see Pym v. Lockyer, 5 Mylne & C. 44. But all agree that ademption is a matter of intent. In Jones v. Mason, 5 Rand. (Va.) 577, the court said, "This whole class of cases depends upon the intention." In Hoskins v. Hoskins, Prec. Ch. 263, it is said, "I answer, it still shows that intention is everything; ejusdem generis nothing." In Chapman v. Salt, 2 Vern. 646, it was said, "Showing that intention is everything." Again, "It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to intention." Rickman v. Morgan, 1 Brown, Ch. 63, 2 Brown, Ch. 394. In Bengough v. Walker, 15 Ves. 507, it was held that a bequest of a share in powder works, charged with an annuity, was a satisfaction of a portion of $2,000, when it was so intended. See, also, Gill's Estate, Pars. Eq. Cas. 139. It is forcefully argued that these cases make obsolete the doctrine of ejusdem generis. Whether they do or not, they certainly show that it must yield to the testator's intent. We cannot, therefore, accede to the proposition of counsel for the defendants "that the conveyance of real estate will not be held a satisfaction of any legacy in whole or in part, even though the intent of the testator is clear." We think the testimony shows the testator's intent. There may be testimony in the record that was incompetent to prove it, but there is sufficient that was competent. The widow was conversant with the entire transaction, and the defendants' statements are admissions of their knowledge of such intentions.

It is contended that "the allowance of a conveyance of property as a satisfaction of a devise or legacy would be equivalent to a revocation of the will in part, and it would have to be proven in the manner provided by our statute for the revocation of wills, e. g. by the destruction of the will, or the making of a new will." How. Ann. St. § 5793; Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699. We think it should not be called a revocation of the will. The defendants' bequests are permitted to stand unquestioned, and matter in discharge of the obligation (i. e. payment) is shown. The will is not overturned or revoked. It is satisfied. We think the prayer of the bill should be granted, and the record should be remanded to the circuit court for the county of Wayne, in chancery, for further proceedings. Decreed accordingly. The other justices concurred.

SALEM NAT. BANK v. WHITE et al.
(42 N. E. 312, 159 Ill. 136.)

Supreme Court of Illinois. Nov. 22, 1895.

Appeal from circuit court, Marion county; B. R. Burroughs, Judge.

Bill by the Salem National Bank against Susan White, Joseph I. White, and others, to foreclose a mortgage, and cross bill by Susan and Joseph I. White for partition. Cross complainants obtained a decree. The bank appeals. Reversed.

L. M. Kagy, for appellant. Henry C. Goodnow, for appellees.

MAGRUDER, J. Section 10 of chapter 39 of the Revised Statutes, being "An act in regard to the descent of property," provides as follows: "If after making a last will and testament a child shall be born to any testator and no provision be made in such will for such child, the will shall not on that account be revoked, but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate." etc. 1 Starr & C. Ann. St. p. 883. William White, the testator, made his will on June 8, 1860, devising all of the real estate, except the strip two feet wide, embraced in the mortgage to appellant, to his widow, Susan White, and his three children, William W. White, Cleopatra C. White, and Lillie P. White. On March 12, 1862, another son, the appellee Joseph I. White, not mentioned in the will, was born to the testator. The testator died on December 13, 1863, without changing or amending his will, and his will was duly probated. It does not appear by the will that William White intended to disinherit Joseph I. White. It follows that the devise of the mortgaged premises, except the said strip, should be abated, to raise a portion for appellee Joseph I. White, equal to that which he would have been entitled to receive out of the estate of William White, if the latter had died intestate. In other words, under the construction given to the foregoing statute by this court in Ward v. Ward, 120 Ill. 111, 11 N. E. 336, Joseph I. White is entitled to an undivided one-fourth part of that portion of the premises embraced in the mortgage of which his father died seised, and which was devised to his mother and his brother and sisters, subject to the dower therein of his mother, the widow, Susan White. As Susan White obtained a conveyance from her three children, William, Cleopatra, and Lillie, of their respective interests in the portion of the mortgaged premises devised to them, the mortgage executed by her to appellant covered an undivided three-fourths of such portion, but did not cover the undivided one-fourth owned by Joseph I. White. We are, therefore, of the opinion that the decree of the circuit court was correct in directing the mortgage to be enforced against the interest of Susan White alone, and not against the interest of Joseph I. White.

1. It is claimed by appellant that Mrs. White and her son Joseph are estopped from claiming that the interest of Joseph is free from the lien of the mortgage. So far as Mrs. White is concerned, she is not claiming Joseph's interest for herself. Whatever acts or conduct on her part might estop her from claiming the one-fourth interest not embraced in the mortgage, it cannot be said that her son Joseph is in any way bound by her acts and conduct. The owner, under the law, of one-fourth interest, he never signed the mortgage, and, therefore, did not part with his interest, or subject it to the lien of the mortgage. We find nothing in the evidence which established any estoppel or acquiescence against Joseph, or makes it inequitable in any way for him to assert his ownership in the property. The officers of the appellant bank and the holders of the mortgages of 1889 and 1877 lived in Salem, where William White lived in his lifetime, and where his widow and children lived after his death. They knew Joseph I. White as a boy, and after he became of age, and knew that he was a son of William White and Susan White. The record of the title to the mortgaged property, of which the holders of the mortgage were bound to take notice, showed the will of William White, and that it mentioned only three of his children, and it showed, also, that Joseph I. White never united with the other three children in the conveyance to his mother. We think that, under the testimony, the bank was not only affected with constructive notice of the outstanding interest in Joseph I. White when they accepted the mortgage, but that it had actual notice of such interest. We are aware, however, of no principle of law by which a purchaser or mortgagee of the interests of all the tenants in common in a piece of land, except one, can appropriate the interests of that one, whether they did or did not have notice of such interest at the time of the purchase or mortgage. If there is any species of estoppel which can be set up against Joseph I. White, it must be estoppel by conduct. "When a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things." People v. Brown, 67 Ill. 435. To constitute estoppel by conduct, it must appear that there was a representation concerning material facts, made, with the knowledge of the facts, to a party ignorant of the truth of the matter, with the intention that it should be acted upon; and it must appear that it was acted upon. Fraud, or

something tantamount thereto, is said to be a distinctive characteristic of this kind of estoppel. People v. Brown, supra; Flower v. Elwood, 66 Ill. 438; Powell v. Rogers, 105 Ill. 318. Joseph I. White did not become of age until March, 1883. He was away from Salem at school 5 or 6 years. He left Salem altogether at the age of 23 years, to go to California, where he has since resided. He neither said nor did anything, nor made any representations which induced the holders of the mortgage of 1889, or the holders of the previous mortgage of 1877, to believe or act in any such way as to change their previous position, or to justify them in claiming an estoppel against him.

2. It is said that the mortgage executed by Susan White in 1889 covered the interest of Joseph I. White because of the power of attorney executed by Joseph and his brother and sisters to his mother in June, 1884, authorizing her to sell and convey certain real estate, including that embraced in the mortgage. The contention of appellant is that Mrs. White had authority to mortgage, because the power of attorney gave her authority to sell and convey. The mortgage was executed by her alone, in her own name, and not as attorney or agent of her son Joseph. She does not describe herself as agent in the body of the instrument, nor sign it as agent or attorney. There is nothing upon the face of the mortgage to indicate that the mortgagor intended to convey any other interest than that owned by herself. The general rule is that, in order to bind the principal by a deed made by an agent, the deed must not be made by the agent in his own name, but must purport, upon its face, to be made, signed, and sealed in the name of the principal. Story, Ag. (9th Ed.) § 148; Mechem, Ag. §§ 419, 420. But, aside from the general rule thus stated, we do not think that, under the circumstances of this case, the power of attorney to sell and convey carried with it the power to mortgage. It is true that, in some cases, a power to sell for the purpose of raising money will imply a power to mortgage; and in cases of wills, where the power is conferred upon the executor to sell such parts of the land as he shall deem proper for the purpose of paying debts and making improvements, such power to sell has been held to include the power to mortgage. But here there was no evidence of any intention, on the part of those executing the power of attorney, that the power of sale was conferred for any of the purposes thus specified. In case of an ordinary power of attorney to sell land and make deeds to the land sold, the power to sell conveys no implied authority to mortgage. Mechem, Ag. § 323; 1 Am. & Eng. Enc. Law, p. 360; Jeffrey v. Hursh, 49 Mich. 31, 12 N. W. 898. In Jeffrey v. Hursh, supra, Mr. Justice Cooley says: "The principal determines for himself what authority he will confer upon his agent, and there can be no implication, from his authorizing a sale of his lands, that he intends that his agent may, at discretion, charge him with the responsibilities and duties of a mortgagor,"—and cites many cases in support of this position. Hence, we are of the opinion that the execution of the power of attorney to sell does not lead to the conclusion that Mrs. White mortgaged the interest of her son Joseph.

3. It is claimed that the bank, as mortgagee, is entitled to the increased value of Joseph's one-fourth interest caused by the improvements placed upon the property. In order to understand this contention, it will be necessary to refer briefly to some of the facts. When Mrs. White and her three eldest children, William, Cleopatra, and Lillie, made the trust deed to Goodnow in 1877, it was to secure $5,000, borrowed, nominally, from one Martin, but really from appellant; and this sum of $5,000, together with $1,000 subsequently borrowed from the bank or one of its customers, was used in improving the premises described in the mortgage by the erection of a brick building thereon. This improvement was for the benefit of the property, and seems to have been necessary. The premises were in the business part of the town, and the buildings upon them had become old and dilapidated, so that they could not be rented to advantage. The old frame buildings were removed, and a new brick structure was erected. While there is no positive testimony that Joseph I. White was consulted about the erection of the new building, or that he formally consented to it, yet he knew of it, and made no objection to it, and received a direct benefit from it, in the use, by his mother, of the rents derived from it for his support and education. The new mortgage, made by Mrs. White in 1889, after she had received the deed of their interests from the three oldest children, was to secure, not a new indebtedness, but the old indebtedness of $6,000 above mentioned, together with accumulated interest, taxes, insurance, etc. The second mortgage was executed for the purpose of taking up the old notes, given to secure borrowed money used in improving the property. The mortgage of 1889 was, therefore, a mere continuation of the mortgage of 1877, and represented loans of money that were expended in improvements upon the premises. A mere change in the form of the evidence of the debt, not intended to operate as a payment, will not affect the mortgage lien. Flower v. Elwood, 66 Ill. 438; Campbell v. Trotter, 100 Ill. 281. When the mortgage of 1889 was executed to secure an indebtedness representing money used in improving the property, Susan White and Joseph I. White were tenants in common, she owning three-fourths and he one-fourth. He was a tenant in common with the other children when the mortgage of 1877 was made. If his interest in the land was made more valuable by reason of the improvements, and will sell for more at the partition sale on that ac-

count, it would seem to be just that he should make compensation. The doctrine, in equity, is that, when improvements have been made by one tenant in common, the portion improved should, if practicable, be assigned to him in the partition of the estate; and when such a division cannot be made, he should be allowed a reasonable remuneration from those who receive the benefits of the improvement. Where the premises are sold because they are not susceptible of division, the tenant in common making the improvement should be allowed the actual increase of the price received at the sale in consequence of the improvement made. Louvalle v. Menard, 1 Gilman, 39; Howey v. Goings, 13 Ill. 95; Dean v. O'Meara, 47 Ill. 120; Kurtz v. Hibner, 55 Ill. 514; Mahoney v. Mahoney, 65 Ill. 406. In the case at bar, appellee Joseph I. White should be charged, as between him and his cotenant, Susan White, with such increase in the amount which his one-fourth interest in the land shall bring at the sale as results from the fact of its being improved. Cooter v. Dearborn, 115 Ill. 509, 4 N. E. 388. If Mrs. White is entitled to such increase, her lien therefor passes to appellant by virtue of the mortgage executed by her. Improvements placed on real estate by the mortgagor inure to the benefit of the mortgagee, and so, if one tenant in common places improvements upon the common property, and thereby acquires a lien on his cotenant's interest for a proportionate share of the increase in value caused by the improvement, it will be an accession to his interest, which will be subject to a mortgage given by him on the property, and will pass to the mortgagee, to the same extent, in the same manner, and for the same reasons that the improvements became liable to the lien of the mortgage. Baird v. Jackson, 98 Ill. 78. In other words, the mortgagee is entitled to be subrogated to the lien of the mortgage improving the property, as tenant in common, for such proportionate share of increase in value or price as inures to the benefit of the other tenant in common by reason of the improvements. Lagger v. Association, 146 Ill. 283, 33 N. E. 946. We are, therefore, of the opinion that the decree of the court below is erroneous in not providing that there should be paid to the appellant, out of the proceeds of the sale of the interest of Joseph I. White in the premises, such proportion of such proceeds as shall represent the increase added to the amount of the sale of said interest by reason of the improvements.

4. As we understand the evidence, the ownership of Mrs. White and her children in the strip two feet wide covered by the mortgage was not derived from the deceased testator, William White, but was conveyed to them, after his death, by one Richard Atkin and wife. On June 22, 1877, Atkin executed a deed conveying the strip to Mrs. White and the four children. By this deed Joseph I. White became the owner of only one undivided one-fifth part of the strip. The decree, correctly, finds him to be the owner of one undivided one-fourth part of all the mortgaged premises, except the strip in question, but the decree is manifestly erroneous so far as it finds him to be the owner of one-fourth of the strip, instead of finding him to be the owner of one-fifth thereof. The decree should, therefore, be corrected in this respect, so as to conform to the proof.

5. Mrs. White was entitled to dower in the one-fourth part of the mortgaged premises (except the strip) owned by her son Joseph. Ward v. Ward, supra. But her dower in this interest did not pass to the appellant as mortgagee by reason of the mortgage. The mortgage did not convey Joseph's interest. There is nothing to show that the dower therein was ever assigned. Dower may be released to the owner of the fee, but no other disposition can be made of it until it has been set apart. Best v. Jenks, 123 Ill. 447, 15 N. E. 173. The right of dower, in a widow, is no estate in the land until it has been assigned, but it is a right resting in action only, and cannot be aliened. McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681. We do not agree with counsel for appellant in his contention that the bank is entitled to a lien on said dower interest, but regard the decree as correct in not awarding such lien. By reason of the two errors, in regard to the improvements, and the extent of the outstanding interest in the strip described in the mortgage, the decree will be reversed; and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

In re CARPENTER'S ESTATE.

(32 Atl. 637, 170 Pa. St. 203.)

Supreme Court of Pennsylvania. July 18, 1895.

Appeal from orphans' court, Juniata county; Lyons, Judge.

In the matter of the estate of James Carpenter, deceased. From the order of distribution, A. M. Carpenter, a collateral heir, appeals. Affirmed.

James Carpenter, the decedent, was murdered by his son, J. B. Carpenter, in order that the son might get immediate possession of the father's estate under the statute of distributions. The widow became an accessory after the fact. After the commission of the crime, the mother and son conveyed their interests in the property to the attorneys who defended them in the prosecution for murder. The collateral heirs of decedent contend that neither mother nor son could take any interest in the estate, by reason of their crime.

J. Howard Neely and W. U. Hensel, for appellant. J. C. Bucher, W. H. Sponsler and J. N. Keller, in pro. per.

GREEN, J. The penalty for murder in the first degree in Pennsylvania is death by hanging. No confiscation of lands or goods, and no deprivation of the inheritable quality of blood, constitutes any part of the penalty of this offense. The declaration of rights (article 1, § 18, of the constitution of the state) declares that "no person shall be attainted of treason or felony by the legislature," and by section 19 it is provided that: "No attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth. The estate of such persons as shall destroy their own lives, shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof." These are provisions of the organic law which may not be transcended by any legislation. Inasmuch as the prescribed penalty for murder is death by hanging (Crimes Act 1860, § 75; Brightly, Purd. Dig. p. 429, pl. 142), without any forfeiture of estate or corruption of blood, it cannot be said that any such consequences can be lawfully attributed to any such offense. In other words, our constitution positively prohibits any attaint of treason or felony by the legislature, and any corruption of blood by reason of attainder, or any forfeiture of estate, except during the life of the offender. The legislature has never imposed any penalty of corruption of blood or forfeiture of estate for the crime of murder, and therefore no such penalty has any legal existence. In the case now under consideration it is asked by the appellant that this court shall decree that in case of the murder of a father by his son the inheritable quality of the son's blood shall be taken from him, and that his estate, under the statute of distributions, shall be forfeited to others. We are unwilling to make any such decree, for the plain reason that we have no lawful power so to do. The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. We have no possible warrant for doing so. The law says, if there is a son, he shall take the estate. How can we say that, although there is a son, he shall not take, but remote relatives shall take, who have no right to take it if there is a son? From what source is it possible to derive such a power in the courts? It is argued that the son who murders his own father has forfeited all right to his father's estate, because it is his own wrongful act that has terminated his father's life. The logical foundation of this argument is, and must be, that it is a punishment for the son's wrongful act. But the law must fix punishments; the courts can only enforce them. In this state no such punishment as this is fixed by any law, and therefore the courts cannot impose it. It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that upon the death of a person his estate shall vest in his children, in the absence of a will, how can any doctrine, or principle, or other thing, called "public policy," take away the estate of a child, and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory; and the estate cannot be diverted from those persons, and given to other persons, without violating the statute. There can be no public policy which contravenes the positive language of a statute. The supposed analogies derived from the fraudulent abuse of a contract right, or an actual notice accomplishing the same result as a constructive notice under the recording acts, or the waiver of an exemption act by one entitled to its benefits, and other instances of a similar character, are no analogies at all. There may be reasons why a statutory provision may not be applicable in a given case when the purpose of the statute is subserved in a different mode, or dispensed with altogether; but here is a contingency which does not depend upon any act, or omission to act, of any person whatever. It is the act of the law which casts the descent of estates, and that is not regulated or controlled by the acts,

the follies, the frauds, or the crimes of any individual persons. Unless the law itself contains some qualification which changes its application, or provides some disqualification by way of penalty, it must have its way, because there is no other way.

If we consider the question upon authority, we find the great preponderance of judicial decision in accord with the views above expressed. In view of the dreadful and unnatural character of the crime of the son in this case, it is not a matter of wonder that the precise question has never yet been before us, and that there is a dearth of authority among the tribunals upon such a subject. In the case of Owens v. Owens, 100 N. C. 242, 6 S. E. 794, Sarah Owens was convicted of being an accessory before the fact to the murder of her husband. She was sentenced to imprisonment for life, and while undergoing her sentence she petitioned the court to assign her dower in the real estate of her deceased husband. In allowing her petition the court said: "We are unable to find any sufficient grounds for denying to the petitioner the relief she demands, and it belongs to the law-making power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife. Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle." In Deem v. Millikin, 6 Ohio Cir. Ct. R. 357, the facts were that Elmer L. Sharkey murdered his mother for the purpose of succeeding to the title to her real estate. He was convicted and hanged after having mortgaged the real estate. The collateral heirs contended that by reason of his crime no interest had passed to the son and therefore the mortgages were void. In the opinion the court said: "The statute of descent neither recognizes mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. * * * There should be no difficulty in distinguishing this case from those in which the rights asserted have no foundation other than the fraudulent or unlawful conduct of a contracting party, nor from those in which attempts are made to use the process of the courts for fraudulent purposes. * * * The natural inference is that when the legislature incorporated the general rule into the statute, and omitted the exception, they intended that there should be no exception to the rule of inheritance prescribed." In the case of Shellenberger v. Ransom, 59 N. W. Rep. 935, the supreme court of Nebraska, reversing its own former decision reported in 47 N. W. 700, held that the murderer did not forfeit the estate of his daughter, whom he had murdered in order that he might acquire the title to her real estate. At the first hearing the court followed the decision of a majority of the New York court of appeals in Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, but changed their ruling on the reargument in 1894. In delivering the second opinion the court says: "The conclusion reached by the reasoning of Judge Earle in Riggs v. Palmer, as well as that in this case, was based very largely on that species of judicial legislation above characterized as 'rational construction.' If courts can thus enlarge statutory enactments by construction, it may be that the references in the majority opinion in Riggs v. Palmer to the provisions of the civil law were very apt as illustrating how, by rational interpretation, our statute should be made to read. * * * The legislature has spoken. Their intention is free from doubt, and their will must be obeyed. 'It may be proper,' it has been said in Kentucky, 'in giving a construction to a statute, to look to the effects and consequences, when its provisions are ambiguous, or the legislative intent is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action.'" The case of Riggs v. Palmer was decided by a divided court, but it was a case of devise, and not of descent, and involved only the question of permitting a devisee to take title under the will of a testator whom he had murdered in order to get the property devised to him by the will. While we do not agree to the conclusion reached, the case only involved the operation of a private grant, and therein differs widely from a case in which the statutory law of descent is in question. In the former case it was only necessary to set aside an instrument between private parties on the ground of fraud, but in the latter it would be necessary to set aside the positive law of the state. The case of Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, cited for the appellant, merely decided that proof that the assignee of a policy of life insurance caused the death of the assured by felonious means was sufficient to defeat a recovery on the policy. Mr. Justice Field, delivering the opinion, said: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he has willfully fired," thus showing that the decision was based entirely upon the ground of fraud upon a contract right. The case of Cleaver v. Association [1892] 1 Q. B. 147, also cited for appellant, is of an entirely similar character. It was an attempt to enforce a trust in favor of one who had brought about the conditions essential to its fulfillment by killing the person whose death made it operative. Lord Justice Fry said in the opinion: "If no action can arise from fraud, it seems impossible to suppose it can arise from felony or misdemeanor." In the argument for the appellant no case is cited

which presents the very question which arises on this record. But there are at least the three cases above cited which do involve the same question as this, and they are all decided against the contention of the appellant. These authorities appear to us to be far more in consonance with sound principle than those which are seemingly, though not really, of an opposite tendency, and they certainly harmonize with the views we entertain. The assignments of error are not sustained. The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellant.

WILLIAMS, J. I concur in the disposition of so much of the fund as is derived from the estate of Mrs. Carpenter, who was convicted only of being an accessory after the fact to the murder of her husband. I dissent from the disposition of so much of it as is derived from the alleged estate of the son, who was convicted of murder, and whose crime was committed for the purpose of securing the property of his father. The son could not, by his own felony, acquire the property of his father, and be protected by the law in the possession of the fruits of his crime.

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